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## **Head Matter**

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## Statutory Charter of the Panel

The Secretary of Defense appointed this Panel in accordance with section 574 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law 108-375. Section 574 required the establishment of an independent panel of outside experts to conduct a study and review of the relationships between the legal elements of each of the Military Departments. The Panel's mandate is to make recommendations as to statutory, regulatory, and policy changes that the Panel considers desirable to improve the effectiveness of those relationships and to enhance the legal support provided to the leadership of each Military Department and each of the armed forces.

### Scope of Review

In carrying out the study and review, the Independent Review Panel to Study the Relationships between Military Department General Counsels and Judge Advocates General (hereafter referred to as "the Panel") is charged with five main responsibilities:

- Review the history of relationships between the uniformed and civilian legal elements of each of the Armed Forces;
- Analyze the division of duties and responsibilities between those elements in each of the armed forces;

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- Review the situation with respect to civilian attorneys outside the offices of the Service General Counsels and their relationships to the Judge Advocates General and the General Counsels;
- Consider whether the ability of judge advocates to give independent, professional legal advice to their Service staffs and to commanders at all levels in the field is adequately provided for by policy and law; and
- Consider whether the Judge Advocates General and General Counsels possess the necessary authority to exercise professional supervision over judge advocates, civilian attorneys, and other legal personnel practicing under their cognizance in the performance of their duties.

## Methodology

The Panel held 7 public hearings, at which 46 current and former officials of the Department of Defense and other interested members of the public presented their views. Witnesses included the current General Counsels (GCs) and the Judge Advocates General (TJAGs) of the Military Departments;<sup>1</sup> the Department of Defense General Counsel; the Counsel for the Commandant of the Marine Corps; and a cross section of senior civilian and uniformed clients at the Department headquarters and major command levels

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<sup>1</sup> Unless otherwise noted, the term “Judge Advocate General” includes the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC).

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1 including representatives from the Office of the Chairman of the Joint Chiefs of Staff and  
2 from joint and operational commands. The Panel also heard from former Military  
3 Department Secretaries, General Counsels, Judge Advocates General, and from  
4 professional organizations. The Members considered written submissions from the  
5 Military Departments, professional organizations, and members of the public. The Panel  
6 discussed this information in several deliberation sessions, all of which were open to the  
7 public. The Members thank the many individuals who have informed our work over the  
8 past several months. The Panel has based its findings and recommendations in this  
9 Report upon the written submissions and the testimony received, as well as upon the  
10 depth and breadth of experience of the Panel members.

## 11 **A Tradition of Excellence**

12 It is the unanimous view of the Panel and of the witnesses who appeared before it  
13 that the Department of Defense, at all levels, is served by an exceptionally able,  
14 committed, and dedicated cadre of military and civilian lawyers. It is also clear that  
15 lawyers at headquarters and in the field play an important role in combat operations of  
16 the Department and that commanders increasingly turn to their assigned counsel for  
17 advice on a wide range of issues. As General John Abrams said in his testimony before  
18 the Panel, the role of the lawyer today is far broader than in earlier conflicts where the

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1 legal counsel focused on “enforcement of standards and discipline in dealing with  
2 misconduct.”<sup>2</sup>

3 Operational commanders and headquarters officials testified that the rule of law  
4 has never been more important than today and that lawyers are an integral part of their  
5 staffs and missions. They have come to rely on their attorneys for more than just legal  
6 advice, drawing on their critical thinking skills and judgment.<sup>3</sup> For this reason, attorneys’  
7 roles are expanding into areas that have not been historically considered legal in nature.<sup>4</sup>  
8 Even in this time of personnel constraints within the Department of the Defense, the  
9 demand for attorneys is growing.<sup>5</sup> Commanders have a great sense of accountability for  
10 their actions, and are looking to and relying upon civilian attorneys and judge advocates  
11 to assist them in fulfilling their critical missions, within the rule of law.

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<sup>2</sup> Transcript, 28 Jun 05, Abrams, pp. 66-67.

<sup>3</sup> See e.g., Testimony of General Cody, Transcript of June 2, 2005 Hearing, pp. 228-229 and 240-241; testimony of General (Ret) John Abrams, Transcript of June 28, 2005 Hearing, pp. 68-69.; testimony of Lieutenant General Schwartz, Transcript of June 2, 2005 hearing, pp. 122-123; Hearing Transcript, Testimony of the Honorable Robin Pirie, June 1, 2005, p. 4; Hearing Transcript, Testimony of VADM Philip M. Balisle, June 1, 2005, p. 192-199; Brig Gen Eric J. Rosborg, June 2, 2005, p. 9; GEN (Ret) Michael Williams, June 28, 2005, p. 76..

<sup>4</sup> Testimony of Brigadier General Sandkuhler, Transcript of May 19, 2005 hearing, pp. 78-79, and testimony of Major General Romig, Transcript of May 19, 2005 hearing, p. 228.

<sup>5</sup> Testimony of Major General Romig, Transcript of May 19, 2005 hearing, p. 168.

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1        Hundreds of legal personnel, from judge advocates to legal specialists, are  
2        deployed overseas in the Global War on Terrorism. A senior DoD civilian attorney  
3        deployed to Iraq and served as the principal legal adviser to the Coalition Provisional  
4        Authority. In addition, a civilian attorney from the Department of the Navy was  
5        deployed to Iraq to provide legal support to the CPA. In May of 2005, the Army had  
6        over 600 judge advocates and paralegals deployed overseas, and the Navy currently has  
7        32 judge advocates and legalmen deployed to Iraq, Afghanistan, and afloat in the area of  
8        operations. To better adapt and respond to the needs of the operational commander, the  
9        Marine Corps has judge advocates assigned down to the battalion level, and the Army has  
10       restructured itself to assign judge advocates to combat units, including Stryker brigades.<sup>6</sup>  
11       Air Force judge advocates have performed a variety of missions in Iraq, such as serving  
12       as legal adviser to the Iraq Survey Group and as members of Joint Services Law  
13       Enforcement Teams. These forward deployed legal teams are exposed to dangers not  
14       typically associated with legal services. Indeed, the Panel notes with sadness that four  
15       military legal professionals have been killed in Iraq and many more wounded. Hundreds  
16       of other legal personnel support the Global War on Terrorism outside the combat zone by  
17       providing critical reach-back capability. Department lawyers are meeting the challenge.  
18       Their efforts continue to make America stronger and more secure.

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<sup>6</sup> Testimony of Brigadier General Sandkuhler, Transcript of May 19, 2005 hearing, pp. 65, and  
testimony of Major General Romig, Transcript of May 19, 2005 hearing, p. 228.

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## Overview

1  
2       The growing importance of lawyers in the Department should be viewed as a  
3 positive development. Commanders understand that the scope of their authority is  
4 defined by such things as treaties and international agreements, United States statutes, the  
5 terms of Authorization and Appropriations Acts, and specific rules of engagement  
6 authorized by the President and Secretary of Defense.<sup>7</sup> In the war on terrorism, a  
7 commander's scope of authority is perhaps less clear because operations take place  
8 outside of familiar legal frameworks like those associated with NATO and operations in  
9 Korea.<sup>8</sup> It is the commander's lawyer, sometimes in coordination with legal offices in the  
10 Pentagon, who advises the commander on the range of options available to him.

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<sup>7</sup> Cite to General John Abrams testimony.

<sup>8</sup> As General John Abrams testified, "What's happened now is we're operating in environments that do not have the structure . . . of formal treaty arrangements—either with the host nation or with our allies and friends. And when you put a senior commander in that kind of an environment . . . what you find is the legal counsel will help you bridge the lack of the structure of these arrangements. . . ." Transcript of June 28, 2005 Hearing, pp. 67. General Mike Williams agreed, "[I]f wars of the coming Century looked more like Iraq and less like Korea, we're going to see an increased demand for legal services . . . . We're going to need to provide the point man who is going to be less senior and less experienced than he used to be—that commander—[and] we're going to have to provide him with legal services." Transcript of June 28, 2005 Hearing, pp. 74-75.

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1           The Panel notes that because of the ubiquity of satellite communications and  
2 Internet access on the battlefield, lawyers who are forward deployed are able to “reach  
3 back” to higher headquarters for advice on unique issues facing front line commanders.  
4 This is completely appropriate, especially where novel issues have been presented. For  
5 example, when the advice needed is in the area of fiscal or acquisition law, the most  
6 knowledgeable lawyers may be found at the headquarters, either in the Office of the  
7 TJAG or in the Office of the General Counsel. At other times, advice requires  
8 coordination with the Legal Counsel to the Chairman of the Joint Chiefs of Staff or with  
9 the DoD General Counsel, both of whom lead highly expert legal offices. As further  
10 discussed at the end of this Report, the Panel believes that the current largely ad hoc  
11 structure for reach back is generally working, but that attention needs to be paid to the  
12 organization, staffing, and coordination of Pentagon-level legal support to field  
13 commanders to ensure that advice given to the field is appropriately vetted – and  
14 therefore authoritative – and to ensure that there are sufficient headquarters legal  
15 resources available to the DoD General Counsel and to the Chairman to meet the reach-  
16 back needs of deployed commanders.

## **The Department of Defense Legal Community**

18           Legal organizations and organic legal support are integrated into every facet of  
19 the Department of Defense. The Military Departments are each served by a General  
20 Counsel with attendant staff, along with a Judge Advocate General heading a JAG Corps.  
21 The Secretary of Defense and Chairman of the Joint Chiefs of Staff each has their own  
22 legal staff, as do the Defense Agencies, the Unified Commands and most installation and

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1 higher commands within the Military Departments. Defining what the Panel believes to  
2 be the appropriate organizational relationships between these separate legal elements is  
3 the gravamen of this Report.

4 As of May 2005, the Department of Defense listed a total of 10,874 personnel  
5 authorizations dedicated to legal services and support across the Defense establishment.  
6 This aggregate number encompasses civilian attorneys; active duty and reserve judge  
7 advocates, paralegals and administrative staff. The structure and defined responsibilities  
8 of the disparate legal organizations to which this cadre are collectively assigned will be  
9 addressed in more detail later. Nevertheless, as a starting point for analysis, it is  
10 important to note that these 10,874 authorizations, whether designated uniformed or  
11 civilian, are all government personnel.

12 Current law and policy provides that most legal services are either inherently  
13 governmental or closely associated with inherently governmental functions.<sup>9</sup> When a  
14 Military Department or the Department of Defense seeks to contract for private sector  
15 legal services, a rigorous set of requirements must be met. These include a finding that  
16 DoD personnel cannot be made available; contract performance will be supervised by  
17 DoD personnel; and that the organizational conflicts of interest laws are not violated.  
18 Even in instances meeting these touchstones for outsourcing, the relevant law requires

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<sup>9</sup> Federal Activities Inventory Reform Act of 1998, P.L. 105-270, 112 Stat. 2382, Section 5(2)(b),  
31 U.S.C. 501, note; P.L. 108-375, Section 804.

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1 that only DoD personnel can perform any inherently governmental functions relating to  
2 the contract.<sup>10</sup>

3 As a practical matter, these rules reflect the fact that almost all legal support for  
4 the Defense establishment is provided “in-house,” by government attorneys. It is the  
5 Panel’s collective opinion that the Defense Department has been well-served by the  
6 decision to define legal support, in the aggregate, as an inherently governmental function.  
7 In particular, the natural tendency of both civilian and uniformed leaders to view their  
8 legal advisors as the “sword and shield” needed to successfully carry out their duties  
9 supports the wisdom of requiring that core legal services be provided by government  
10 attorneys, as a matter of sound public policy. In those unique situations where  
11 contracting for legal support has been found appropriate, the Panel agrees that such  
12 contracts should always be supervised by government attorneys to ensure there is  
13 stringent accountability for the legal advice provided to decision makers.

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<sup>10</sup> Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, September 23, 1992, defines an Inherently Governmental Function as one “that is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government.”

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## Historical Context

The number of positions for attorneys in the U. S. military has gradually grown from the first judge advocate to a large and diverse staff of uniformed and civilian lawyers. At first, the few full-time military attorneys were judge advocates responsible for advice to field commanders and for the administration of courts-martial under the Articles of War. As the size of the standing armed services grew, the legal requirements became more complex. Today, a cadre of senior civilian and military attorneys in DoD guide the provision of legal services to meet these diverse requirements. These senior attorneys have become integral members of the various components' leadership teams.

In early U.S. military history, very few statutory or regulatory positions existed for military attorneys. Many citizen-soldiers who happened to be lawyers provided legal services for commanders, but the need for an officer who could concentrate on command legal matters emerged over time. The first of the statutory military attorneys was the forerunner of today's Army Judge Advocate General, appointed in 1775.<sup>11</sup> The Navy had intermittent authorizations for a senior uniformed attorney until the Office of The Judge Advocate General was established by statute in 1880. In 1947, when the Air Force became a separate Service, the senior Air Force military attorney was the Air Judge

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<sup>11</sup> On July 29, 1775, the Second Continental Congress, at the request of General George Washington, created the position of Judge Advocate General of the Army, and appointed William Tudor of Boston, a 25-year old Harvard graduate, as Judge Advocate General with the rank of Lieutenant Colonel.

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1 Advocate, under the Director of Personnel. The next year, Congress created the Office of  
2 the Judge Advocate General of the Air Force, putting it on par with the Army and Navy.  
3 The duties of these offices ebbed and flowed over the history of each Service, but the  
4 centerpiece of uniformed military practice has always been the provision of advice to  
5 commanders on the law of armed conflict and on the administration of military justice.

6 The forerunners of the modern General Counsel positions grew out of a need for  
7 advice to the Secretary of War and the Secretary of the Navy on largely commercial,  
8 legislative, and political matters. Prior to 1947, the War Department and the Department  
9 of the Navy each had a civilian headquarters staff, almost completely separate from the  
10 military staff, which was dedicated to supporting the Secretaries. As early as 1941, the  
11 Navy established a Procurement Legal Division and, in 1944, designated a General  
12 Counsel in the civilian headquarters staff to oversee procurement aspects of the  
13 mobilization for World War II. Within the Army, the need for specialized legal services  
14 to the technical bureaus responsible for procurement also led to the creation of large  
15 civilian staffs, independent of the Judge Advocate General. The senior civilian official  
16 responsible for air forces, the Assistant Secretary of War for Air, had an assistant  
17 executive officer responsible for legal aspects of the office, including legislative affairs.

18 With the enactment of the National Security Act of 1947, the Military  
19 Departments, including the newly created Department of the Air Force, were  
20 consolidated under the National Military Establishment, later renamed the Department of  
21 Defense. While the Act generally contemplated “unification” of the four Services, it  
22 explicitly rejected the notion of a single general staff with command authority. As part of

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1 its formation as an independent Service in 1947, the Secretary of the Air Force appointed  
2 a General Counsel within the Office of the Secretary. In 1950, the Army created a  
3 Department Counselor position “to serve as a trouble shooter for the Secretary in the  
4 political-legislative-legal field.”<sup>12</sup> The position was later designated the General Counsel.  
5 Thus by 1986, when Congress enacted the Goldwater-Nichols Act, each of the Military  
6 Departments had already developed a robust Office of General Counsel, although the  
7 positions were not yet established in statute.

8 The position of General Counsel of the Department of Defense was established by  
9 Defense Reorganization Plan No. 6 of 1953,<sup>13</sup> and by DoD Directive 5145.1, August 24,

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<sup>12</sup> Department of the Army Submission, p 1.

<sup>13</sup> 67 Stat. 639; President Eisenhower submitted Reorganization Plan No. 6 to both Houses of Congresses on April 30, 1953. The Plan advised Congress of organizational changes in the Department of Defense made pursuant to the President’s executive authority, as well as to seek legislative action for those organizational modifications requiring statutory changes. The first of three stated Presidential objectives for the plan was to strengthen civilian control of the military: “Our military Establishment must be founded upon our basic constitutional principles and traditions. There must be a clear and unchallenged civilian responsibility in the Defense Establishment. This is essential not only to maintain democratic institutions, but also to protect the integrity of the military profession. Basic decisions relating to the military forces must be made by politically accountable civilian officials.” The plan requested that Congress make the DoD General Counsel a statutory position: “In addition, the plan also provides that, in view of the importance of authoritative legal opinions and interpretations, the office of General Counsel be raised to a statutory position with rank substantially equivalent to that of an Assistant Secretary.”

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1 1953.<sup>14</sup> The position was derived from one of the original three Special Assistants to the  
2 Secretary (1947) and the Assistant Secretary of Defense (Legal and Legislative Affairs)  
3 (1949). Congress accepted Reorganization Plan No. 6, and it became effective on June  
4 30, 1953. Reorganization Plan No. 6 established the General Counsel of the Department  
5 of Defense as substantially equivalent in rank to the Assistant Secretaries of Defense.  
6 The General Counsel of the Department of Defense was designated as the Department's  
7 “chief legal officer” in Reorganization Plan No. 6, and is carried through into the current  
8 statutory authorization, 10 U.S.C. § 140.<sup>15</sup> The term “chief legal officer” is not defined in  
9 either the statute or DoD Directive 5145.1, the implementing Directive.

10 DoD Directive 5145.1 delineates 21 specific responsibilities of the DoD General  
11 Counsel, including advising the Secretary and Deputy Secretary of Defense on all legal  
12 matters and services affecting DoD. The DoD General Counsel is responsible for  
13 resolving “disagreements within the Department of Defense” on specific legal and policy  
14 matters.<sup>16</sup> The Directive expressly delegates to the General Counsel the authority to issue  
15 legal guidance and instructions to the Military Departments through their Secretaries, and

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<sup>14</sup> See also Department of Defense Directive 5145.1, dated May 2, 2001.

<sup>15</sup> “(a) There is a General Counsel of the Department of Defense, appointed from civilian life by the President, by and with the advice and consent of the Senate. (b) The General Counsel is the chief legal officer of the Department of Defense. He shall perform such functions as the Secretary of Defense may prescribe.” 10 U.S.C. § 140.

<sup>16</sup> DoD Directive 5145.1, para. 3.10

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to the Combatant Commands through the Chairman of the Joint Chiefs of Staff.<sup>17</sup> It also explains that the DoD General Counsel shall perform such other duties as the Secretary or Deputy Secretary of Defense assigns.<sup>18</sup>

#### ***Goldwater-Nichols Act and Subsequent Legislation***

During the 1980s, Congress conducted a comprehensive examination of the organizational and command structure of the U.S. military, culminating in the Goldwater-Nichols Department of Defense Reorganization Act of 1986 (Goldwater-Nichols).<sup>19</sup> The legislative history of Goldwater-Nichols provides the Panel with guidance regarding the statutory and organizational relationship between General Counsel and Judge Advocates General for each Military Department.

A stated purpose of Goldwater-Nichols was “[t]o revise the organization of the Military Departments to increase civilian control and to eliminate duplication and staff layering.”<sup>20</sup> Goldwater-Nichols required that the Secretaries of the Military Departments be solely responsible for the functions of (1) acquisition, (2) auditing, (3) comptroller,

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<sup>17</sup> *Id.*, at para. 5

<sup>18</sup> *Id.*, at para. 3.21

<sup>19</sup> P.L. 99-433

<sup>20</sup> H.Rep. 99-700, Bill Nichols Department of Defense Reorganization Act of 1986, July 21, 1986, p. 20; *see also* S.Rep. 99-280, Department of Defense Reorganization Act of 1986, April 14, 1986, p. 1.

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1 including financial management, (4) information management, (5) inspector general, (6)  
2 legislative affairs, and (7) public affairs.<sup>21</sup> It further prohibited the creation of a parallel  
3 military staff in areas of exclusive Secretarial authority and directed the Secretaries of the  
4 Military Departments to eliminate duplicative functions between Military Department  
5 Secretaries and Service Chiefs throughout the headquarters.<sup>22</sup>

6 Importantly for present purposes, while Congress codified the positions of  
7 General Counsels in the Military Departments, they did not merge the two legal  
8 organizations.<sup>23</sup> In an effort to avoid duplication and staff layering, the Senate Armed  
9 Services Committee (SASC) Professional Staff did present an option to the Committee to  
10 amend the organizational structures of each Service to require the Judge Advocates  
11 General to report to the General Counsels instead of the Service Chiefs or, in the case of  
12 the Navy, to the Secretary.<sup>24</sup> The SASC did not adopt this option.

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<sup>21</sup> Goldwater-Nichols, Sections 501 (Army), 511 (Navy), and 521 (Air Force); *See also* 10 U.S.C. §§ 3014(c)(1) (Army), 5014(c)(1) (Navy), and 8014(c)(1) (Air Force).

<sup>22</sup> *Id.*; *See also* H.Conf.Rep. 99-824, Goldwater-Nichols Department of Defense Reorganization Act of 1986, September 12, 1986, pp. 146-152.

<sup>23</sup> P.L. 99-433 §§ 501 (Army), 511 (Navy), and 521 (Air Force); 10 U.S.C. §§ 3019, 5019, and 8019 (1986).

<sup>24</sup> S.Rep. 99-86, Defense Organization, Staff Report to the Committee on Armed Services, United States Senate, October 16, 1985, at 456-462.

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1       The Senate Report on the Goldwater-Nichols bill expressly noted the decision to  
2   continue some duplication in headquarters legal organizations, notwithstanding the  
3   overarching purpose of Goldwater-Nichols to weed out duplicative functions and efforts  
4   between Military Department Secretaries and military staff. During its consideration of  
5   the bill, the SASC noted that:

6                   Subsection (c) of Section 8014 would require the  
7                   Secretary of the Air Force to ensure that the Office of the  
8                   Secretary of the Air Force does not duplicate specific  
9                   functions for which the Air Staff has been assigned  
10                  responsibility. While recommending the elimination of  
11                  duplication, the Committee does see a continuing need for  
12                  the General Counsel of the Air Force as a key assistant to  
13                  the Secretary of the Air Force, particularly on sensitive  
14                  matters directly related to civilian control of the military.<sup>25</sup>

15   The Senate Report contains substantially identical language relating to the Department of  
16   the Army and Department of the Navy.<sup>26</sup> Thus, while Congress was concerned about

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<sup>25</sup> S.Rep. 99-280, Department of Defense Reorganization Act of 1986, April 14, 1986,, p. 69-70; ;  
*see also* H.Rep. 99-700, *supra*.

<sup>26</sup> *Id.*, p. 56 (Army), p. 63 (Navy) ; *See also* H.Conf.Rep. 99-824, p. 149

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1 duplication, it acknowledged and accepted the need for both General Counsels and Judge  
2 Advocates General.

3 The bill left many questions unanswered, including “any provisions for where the  
4 Service general counsels would fit into the organization” of the respective Military  
5 Departments.<sup>27</sup> In its Conference Report accompanying the Goldwater-Nichols statute,  
6 Congress explained that it was establishing the positions of General Counsel of the  
7 Military Departments in law as it existed in fact on the date of passage and left the  
8 specific duties of the General Counsels to the discretion of the Military Department  
9 Secretaries.<sup>28</sup>

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<sup>27</sup> *Id.* at pp. 169-170

<sup>28</sup> H.Conf.Rep. 99-824, pp. 153-154

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1 In 1988, Congress added the requirement that General Counsels of the Military  
 2 Departments be appointed with the advice and consent of the Senate.<sup>29</sup> The SASC  
 3 intended that the General Counsel would have the status of an Assistant Secretary and  
 4 that the General Counsel would be involved in the management of the Departments at the  
 5 highest levels.<sup>30</sup>

6 Subsequently, however, Congress signaled that it intended to limit executive  
 7 discretion to delegate certain authorities to the General Counsels. An indication of this  
 8 occurred in response to a memorandum issued by Deputy Secretary of Defense David S.  
 9 Atwood, dated March 3, 1992 (Atwood Memorandum). The Atwood Memorandum  
 10 identified General Counsels of all Military Departments as “chief legal officers ...  
 11 responsible and accountable for proper, effective and uniform interpretation and  
 12 application of the law and delivery of legal services,” whose opinions “shall be the

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<sup>29</sup> National Defense Authorization Act for Fiscal Year 1989, *supra*; 10 U.S.C. §§ 3019 (Army),  
 5019 (Navy), 8019 (Air Force).

<sup>30</sup> The Honorable Craig S. King served as General Counsel of the Navy from November 22, 1989  
 through January 20, 1993, making him the first Senate confirmed General Counsel of the Navy. Mr. King  
 testified before the Panel that the Staff Director and General Counsel of the SASC informed him at the time  
 that the SASC intended the General Counsel of the Navy to have the status of an Assistant Secretary and to  
 be involved in the management of the Department of the Navy at the highest levels. Hearing of June 15,  
 2005, pp. 280-283; *See also* Background Material on Structural Reform of the Department of Defense,  
 Staff Report of the House Committee on Armed Services, 99th Cong., 2nd Sess., March 1986, p. 21 (“Each  
 department shall have a general counsel who will have the status of an assistant secretary.”).

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1 controlling legal opinions of their respective Departments.”<sup>31</sup> In addition, the Atwood  
2 Memorandum directed that the “civilian and military personnel performing legal duties  
3 ... under the Secretary ... shall be subject to the authority of the General Counsel ....”<sup>32</sup>

4 The sense of the Senate regarding the Atwood Memorandum was reflected in the  
5 Senate Report to accompany the National Defense Authorization Act for Fiscal Year  
6 1993. The Report stated that it did not intend “to restrict ... the service General Counsels  
7 in exercising any authority provided to them by the Secretary of Defense or the Secretary  
8 of the Military Department concerned under either current regulations or such future  
9 regulations as may be authorized by applicable law.”<sup>33</sup> It also expressed concerns  
10 regarding potential interpretations of the Atwood Memorandum:

11 [The memorandum] is also susceptible to an  
12 interpretation that would assign to the military department  
13 General Counsels specific management duties with respect  
14 to the diverse legal organizations within their departments.  
15 If so interpreted, the memorandum could require the DOD  
16 and service General Counsels to undertake a range of  
17 specific duties that would diminish their ability to

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<sup>31</sup> Atwood Memorandum, March 3, 1992.

<sup>32</sup> Atwood Memorandum, March 3, 1992.

<sup>33</sup> S. Rept. 102-352

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1 concentrate attention on important oversight  
2 responsibilities.<sup>34</sup>

3 In connection with the subsequent nomination of David S. Addington to serve as  
4 General Counsel of the Department of Defense, the Senate asked questions relating to the  
5 Atwood Memorandum. Mr. Addington clarified that the Memorandum did not provide a  
6 basis for the General Counsel of a Military Department to direct the Judge Advocate  
7 General in the execution of any statutory responsibility of the respective TJAG.<sup>35</sup>

8 On August 14, 1992, then-Acting Secretary of Defense Atwood issued a second  
9 memorandum superseding the March memorandum. It stated that the Secretaries of the  
10 Military Departments shall ensure that the General Counsels serve as chief legal officers  
11 of their respective departments and may issue controlling legal opinions. The August 14  
12 memorandum further stated that it shall be implemented consistent with the statutes  
13 relating to the Judge Advocates General of the Military Departments. After the responses  
14 from Mr. Addington during his confirmation hearing and the issuance of the August 14  
15 memorandum, Congress took no further action on the matter.

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<sup>34</sup> *Id.*

<sup>35</sup> See Answers to Sub-Questions 30h (*the second*) through 30k to Mr. Addington, attached as  
Appendix \_\_\_\_.

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1 In 1994, Congress added the General Counsels to the order of succession to  
 2 Secretaries of the Military Departments.<sup>36</sup> In passing this provision, Congress noted that  
 3 General Counsels were established in law under Goldwater-Nichols at one grade below  
 4 Assistant Secretaries, and in 1991, “Title [5] was amended to raise General Counsels to  
 5 Level IV of the Executive Schedule, equal in rank to the Assistant Secretaries.”<sup>37</sup> Also in  
 6 1991, Executive Order 12787 established the order of succession to the Secretary of  
 7 Defense, grouping the General Counsels and Assistant Secretaries of the Military  
 8 Departments.<sup>38</sup> Congress passed Section 902 of the National Defense Authorization Act  
 9 for Fiscal Year 1995 to include General Counsels in the order of succession of their  
 10 respective Military Departments.<sup>39</sup>

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<sup>36</sup>National Defense Authorization Act for Fiscal Year 1995, P.L. 103-337, § 902 (1994); 10 U.S.C. §§ 3017 (Army), 5017 (Navy), 8017 (Air Force). The General Counsel of the Navy had been added to the order of succession to the Secretary of the Navy under an Executive Order. Executive Order 12879, November 8, 1993. The General Counsel of the Army also was added to the order of succession to the Secretary of the Army through an Executive Order (Executive Order 12908, April 22, 1994)

<sup>37</sup> 140 Cong.Rec.S. No. 51, 103<sup>rd</sup> Cong., 2<sup>nd</sup> Sess., at 5053, 5062 (May 3, 1994); 5 U.S.C. § 5315

<sup>38</sup> *Id.*; Executive Order 12787, December 31, 1991; Executive Order 13000, dated April 24, 1996, changed EO 12787 to reflect organizational changes in the Department of Defense. EO 13000 did not change the ranking of General Counsels of the Military Departments in the order of succession to the Secretary of Defense. Executive Order 13000, April 24, 1996.

<sup>39</sup>140 Cong.Rec.S. No. 51, *supra*.

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1           The issue of the appropriate role and mission of a Service General Counsel and  
2 Judge Advocate General arose again in 2003, when Air Force Secretary James Roche was  
3 attempting to further remove duplication between the functions of the Air Force  
4 Secretariat and the Air Staff. As Secretary Roche explained in testimony to the Panel,  
5 there was unnecessary duplication between the office of the General Counsel and the  
6 office of the Judge Advocate General. As he put it, “I was in a situation that no firm -- no  
7 business firm--would tolerate, which would be two independent competing law firms  
8 within it ...”<sup>40</sup> In addition, Secretary Roche felt “[he] really had no insight into how [the  
9 TJAG] recruited, how they trained, how they developed, how they were assigned, how  
10 numbers are chosen.”<sup>41</sup> To correct this deficiency, he asked his General Counsel and  
11 Judge Advocate General to present a plan for eliminating duplication between their  
12 respective offices. When that effort failed, he issued Secretary of the Air Force Order  
13 (“SAFO”) 111.5 on May 15, 2003.

14           Among other things, the SAFO gave the General Counsel broad authority to set  
15 legal policy for the Department, to become involved in any legal matter, to oversee the  
16 provision of legal services throughout the Department, and to review all legal training  
17 within the Department. In addition, the General Counsel was made “solely responsible  
18 ... for legal aspects of major matters arising in or involving the Department ....” ,

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<sup>40</sup> June 15 Transcript at 102.

<sup>41</sup> June 15 Transcript at 108.

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1 Further, the TJAG was given a “dotted line reporting relationship to the General Counsel,  
2 serving as the Principal Military Advisor to the General Counsel.”<sup>42</sup>

3 By giving the General Counsel apparent executive authority over the TJAG, and  
4 by creating a relationship in which the TJAG appeared to become subordinate to the  
5 General Counsel, the SAFO seemed to many in the judge advocate community to create  
6 precisely the type of relationship contemplated in the withdrawn Atwood Memorandum,  
7 a relationship that had been abandoned after opposition by the Senate. It became  
8 painfully apparent to the Panel that the SAFO is evidence of, and has exacerbated, what  
9 has become since 2001 a very poor (perhaps almost non-existent) working relationship  
10 between the Air Force General Counsel and the Judge Advocate General that continues to  
11 the present.

12 In light of the Air Force Order , Congress revisited the respective roles and  
13 responsibilities of the General Counsels and TJAGs of the Military Departments.  
14 Congress enacted legislation stating that no officer or employee of the Department of  
15 Defense may interfere with the ability of the Judge Advocates General to give  
16 independent legal advice to their respective Secretaries or Service Chiefs, or the ability of

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<sup>42</sup> This structure, in which a senior Staff officer became the principal military advisor to an Assistant-Secretary level official, was consistent with the reporting relationships between other Assistant Secretaries and their related military equivalents.

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1 judge advocates in military units to give independent legal advice to commanders.<sup>43</sup> The  
 2 statute also gave the Judge Advocate General of the Air Force authority to direct the  
 3 duties of Air Force judge advocates, reflecting language that already existed for the  
 4 Army.<sup>44</sup> On July 14, 2005, the Acting Secretary of the Air Force issued a new SAFO  
 5 111.5, superseding the May 15, 2003 SAFO.<sup>45</sup> The language quoted above was not  
 6 included in the new SAFO.

7 In the Conference Report, Congress noted that this was “the second time in 12  
 8 years that attempts to consolidate legal services in the Department of Defense have led to  
 9 congressional action.”<sup>46</sup> The point of the legislation is clearly to set a boundary on  
 10 Secretarial discretion to give executive control of the legal function of a Military  
 11 Department to the General Counsel and to subordinate the Judge Advocate General to the  
 12 General Counsel’s organization. The Panel notes that the Presidential Signing Statement  
 13 accompanying the Authorization Act raised the issue of the constitutionality of  
 14 Congress’s direct involvement in an executive branch function.<sup>47</sup>

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<sup>43</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, P.L. 108-375, §  
 574 (“Section 574”).

<sup>44</sup> Section 574(c)(2); *Compare* 10 U.S.C. § 8037(c)(2) *with* 10 U.S.C. § 3037(c)(2)

<sup>45</sup> SAFO 111.5, dated July 14, 2005.

<sup>46</sup> H. Rep. 108-767, at 682

<sup>47</sup> President’s Statement on the Ronald Reagan National Defense Authorization Act, 2005,  
 October 29, 2005, p. 1 (“The executive branch shall construe section 574 in a manner consistent with: (1)

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1           The Panel has concluded that the discord that has occasionally marred the  
2 relationship between Military Department General Counsels and Service Judge  
3 Advocates General has not detracted from the exceptionally high quality of legal advice  
4 available to senior Department officials. Moreover, this discord has been largely  
5 confined within the walls of the Pentagon, and generally it appears not to have impacted  
6 commanders in the field. Nonetheless, it is unhealthy and unnecessary and must be  
7 resolved.

## 8                   **Structures, Roles and Responsibilities**

### 9           ***Department of Defense General Counsel***

10           DoD General Counsel is the chief legal officer of the Department of Defense. He  
11 supervises the Office of the General Counsel and the Defense Legal Services Agency  
12 (DLSA). As part of his Department-wide duties, the General Counsel is “dual-hatted” as  
13 the Director of the DLSA, a DoD Agency that provides legal advice and services for the  
14 Defense Agencies, DoD Field Activities, and other assigned organizations.

15           The DoD Office of General Counsel is composed of seven divisions, each headed  
16 by a Deputy General Counsel: International Affairs, Fiscal, Intelligence, Acquisitions &  
17 Logistics, Legal Counsel, Personnel & Health Policy, and Environment & Installations.

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the President’s constitutional authorities to take care that the laws be faithfully executed, to supervise the  
unitary executive branch, and as Commander in Chief ....”)

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1 The charter and responsibilities for the DLSA are set forth in DoD Directive  
2 5145.4, *Defense Legal Services Agency*. This directive establishes the DLSA as a  
3 separate agency of the Department of Defense, under the direction, control, and authority  
4 of the General Counsel. DLSA serves as the organizational conduit through which the  
5 legal staffs of the Defense Agencies<sup>48</sup> and Defense Field Activities<sup>49</sup> report to the DoD  
6 General Counsel. At the headquarters level, DLSA is comprised of the Standards of  
7 Conduct Office, Office of Legislative Counsel, Defense Office of Hearings & Appeals  
8 and the Administrative Office.

9 There are a total of 550 attorneys currently assigned or reporting to the DoD  
10 General Counsel. This aggregate number includes 68 attorneys assigned directly to the  
11 Office of General Counsel and 460 attorneys assigned to the Defense Agencies and Field  
12 Activities. Eight judge advocates are detailed by the Military Departments to various  
13 offices of the General Counsel. Twenty-seven judge advocates are assigned to the Office

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48 These include such organizations as the Defense Advanced Research Projects Agency, Defense Commissary Agency, Defense Finance and Accounting Service, Defense Information Systems Agency, Defense Intelligence Agency and Defense Logistics Agency.

49 These include such organizations as the American Forces Information Service, Defense Prisoner of War/Missing Personnel Office, Defense Education Activity, Defense Human Resources Activity and the Tricare Management Activity.

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of Military Commissions, a temporary body that does not reflect permanent manpower authorizations for the organization.

### ***Office of the Chairman of the Joint Chiefs of Staff***

10 U.S.C. § 155 provides for an independently organized Joint Staff, operated under the authority, direction and control of the Chairman, to support the Chairman in fulfillment of his statutory duties. As with other elements of the Joint Staff, there is no separate statutory provision addressing legal support for the Chairman. The Office of the Chairman of the Joint Chiefs of Staff includes a legal element, designated as “Legal Counsel” (LC), who reports directly to the Chairman as a part of his personal staff. A legal advisor has been on the staff of the Chairman since General Omar Bradley became Chairman of the Joint Chiefs in 1949. The office combined the legal and legislative affairs function until 1990, when the Office of Legal Counsel became a separate element of the Chairman’s staff.

The mission and responsibilities of the Legal Counsel are defined by regulation and policy. Joint Staff Manual 5100.01B, *Organization And Functions Of The Joint Staff*,<sup>50</sup> is the foundational document defining the role of Chairman’s Legal Counsel. In particular, Enclosure B of this Manual includes LC as one of the organizations comprising the “Office of the Chairman” (OCJCS). The stated mission of all the

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<sup>50</sup> 21 Jun 2001 (Change 1, 9 Aug 2002).

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1 organizational elements within OCJCS, to include Legal Counsel, is to “provide support  
2 and assistance to the Chairman and Vice Chairman as directed.”

3 The role of the Chairman’s Legal Counsel is multi-faceted and uniquely  
4 positioned within the interconnecting web of legal organizations within the Defense  
5 Department. This attorney provides independent legal advice to the Chairman, while also  
6 serving as a liaison between the Unified Command legal elements and the DoD General  
7 Counsel. The absence of a statutorily defined set of responsibilities for this legal  
8 organization, while perhaps appropriate given the precisely defined statutory  
9 responsibilities of the Chairman it supports, requires that the Office of Legal Counsel  
10 carefully balance their independent advisory and broader liaison role.

11 In the view of the Office of Legal Counsel, it acts through and in support of the  
12 broad statutory responsibilities of the Chairman. The Chairman’s statutory  
13 responsibilities are set forth in 10 U.S.C. § 151 and § 153:

- 14 • Acts as the principal military advisor to the President, Secretary of  
15 Defense (Secretary) and the National Security Council
- 16 • Acts as spokesman for the combatant commands, especially on operational  
17 matters
- 18 • Oversees the activities of the combatant commands
- 19 • Transmits communications between the President or the Secretary and the  
20 combatant commanders

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- 1           • Provides guidance and direction to the combatant commanders on aspects  
2           of command and control for operations
- 3           • Arranges for military advice to be provided to all the offices of the  
4           Secretary of Defense
- 5           • Advises the Secretary on the priorities of requirements of the combatant  
6           commands

7           Thus, LC views its role as ensuring that comments and concerns of the combatant  
8    commands related to legal issues are well represented and advocated during all levels of  
9    coordination; helping to provide oversight of legal services within the joint community;  
10   acting as a communication channel between the combatant command legal staffs and the  
11   DoD General Counsel; and routinely providing the DoD General Counsel with the joint  
12   perspective on legal issues.

13          The size and grade distribution of attorneys assigned to LC are determined as part  
14   of the overall Joint Staff manning process. Pursuant to 10 U.S.C. § 155, the selection of  
15   officers for the Joint Staff is made by the Chairman from a list of officers submitted by  
16   the Military Departments. This statutory provision also requires that officers be selected  
17   by the Chairman in “approximately equal numbers” from each of the armed forces (other  
18   than the Coast Guard).

19          Nine attorneys, all of whom are judge advocates, are currently assigned to LC.  
20   All of the Military Departments are represented among these attorneys. The senior

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attorney in LC is designated as “Legal Counsel to the Chairman.” This position is authorized a grade of O-6 (captain for the Navy or Coast Guard, colonel for the other armed forces). As with other aspects related to the organization of LC, the Chairman determines the grade designation in conjunction with the Joint Staff personnel process.

## ***Military Departments***

Goldwater-Nichols created the current statutory descriptions of the functions and responsibilities of the Military Department Secretaries and Service Chiefs.<sup>51</sup> The statute provides that the Secretaries of the Military Departments are responsible for, and have the authority necessary to conduct, all affairs of their Departments.<sup>52</sup> The Office of the Secretary of each Department has certain prescribed positions<sup>53</sup> and functions for which

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<sup>51</sup> Goldwater-Nichols Department of Defense Reorganization Act of 1986, P.L. 99-433, §§ 501 and 502 (Army), 511 and 512 (Navy), and 521 and 522 (Air Force), 100 Stat. 3873, Nov. 14, 1986.

<sup>52</sup> These include recruiting; organizing; supplying; equipping (including research and development); training; servicing; mobilizing; demobilizing; administering (including the morale and welfare of personnel); maintaining; construction, outfitting, and repair of military equipment; and construction, maintenance, and repair of buildings, structures, and utilities and the acquisition of real property. 10 USCS §§ 3013(b), 5013(b), and 8013(b).

<sup>53</sup> Generally, these include the Under Secretary; the Assistant Secretaries; the General Counsel; the Inspector General; and the Chief of Legislative Liaison or Affairs. 10 USCS §§ 3014(b), 5014(b), and 8014(b).

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the Secretary is solely responsible.<sup>54</sup> The Department Secretaries are given broad discretion to assign, detail, and prescribe duties of military and civilian personnel in the Department; change the title of any officer or activity not prescribed by law; and prescribe regulations to carry out secretarial functions, powers, and duties.<sup>55</sup> The Secretary of each Department also has many responsibilities relating to military justice matters,<sup>56</sup> including the authority to convene general courts-martial.<sup>57</sup>

## Statutory Structure

The Military Department General Counsels are members of the Office of their respective Department Secretary.<sup>58</sup> They are appointed from civilian life by the President, with the advice and consent of the Senate;<sup>59</sup> serve at Level IV of the Executive Schedule;<sup>60</sup> and are in the order of succession to the Secretaries.<sup>61</sup> The General Counsel performs such functions as the Secretary may prescribe.<sup>62</sup>

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<sup>54</sup> These include acquisition; auditing; comptroller (including financial management); information management; inspector general; legislative affairs; and public affairs. 10 USCS §§ 3014(c), 5014(c), and 8014(c).

<sup>55</sup> 10 USCS §§ 3013(g), 5013(g), and 8013(g).

<sup>56</sup> 10 USCS §§ 801, *et seq.*

<sup>57</sup> 10 USCS § 822.

<sup>58</sup> 10 USCS §§ 3014(b)(4), 5014(b)(3), and 8014(b)(3).

<sup>59</sup> 10 USCS §§ 3019(a), 5019(a), and 8019(a).

<sup>60</sup> 5 USCS §§ 5315.

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The Judge Advocates General (TJAGs) and the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to the CMC) are appointed by the President, with the advice and consent of the Senate.<sup>63</sup> The TJAGs are appointed in the grade of major general or rear admiral, as appropriate, and the SJA to the CMC is appointed in the grade of brigadier general.<sup>64</sup> Statutory duties are described below.

## Functions, Roles, and Responsibilities

As noted above, the Military Department Secretary has the discretion to expand or contract the General Counsel or Judge Advocate General duties, as long as doing so does not violate another provision of law.<sup>65</sup> Each of the Military Department Secretaries has created policy documents that assign specific functions to the General Counsels and the Judge Advocates General.<sup>66</sup> A summary of the civilian and military attorney authorizations is at Appendix \_\_\_\_.

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<sup>61</sup> 10 USCS §§ 3017(3), 5017(3), and 8017(3).

<sup>62</sup> 10 USCS §§ 3019(b), 5019(b), and 8019(b).

<sup>63</sup> 10 USCS §§ 3037(a) (Army); 5148(b) (Navy); 5046(a) (Marine Corps); and 8037(a).

<sup>64</sup> 10 USCS §§ 3037(a) (Army); 5148(b) (Navy); 5046(a) (Marine Corps); and 8037(a).

<sup>65</sup> Cite Secretarial OTE authority

<sup>66</sup> See, e.g., Army General Orders (GO) No. 26, *Responsibility for Legal Services*, 15 May 1988, and GO No. 3, *Assignment of Functions and Responsibilities Within Headquarters, Department of the Army*, 9 July 2002; SECNAVINST 5430.27A, *Subject: Responsibility of the Judge Advocate General for supervision of certain legal services*, 1 December 1977, SECNAVINST 5430.7N, SECNAVINST

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1 **Army**

2 The statute establishing the position of Army General Counsel provides that the  
 3 General Counsel “shall perform such functions as the Secretary of the Army may  
 4 prescribe.”<sup>67</sup> The Secretary of the Army has done so through general orders, regulations,  
 5 and memoranda. Thus, the Army General Counsel is the chief legal officer of the  
 6 Army,<sup>68</sup> and has responsibility for “providing professional guidance to all military and  
 7 civilian attorneys of the Army on any legal question, policy, or procedure.”<sup>69</sup> Among  
 8 other duties, the Army General Counsel coordinates legal and policy advice at the  
 9 Headquarters level; determines the Army position on any legal question or procedure;  
 10 provides legal advice on acquisition, logistics, and technology programs; provides final  
 11 Army legal clearance on all legislative proposals; establishes and administers Army  
 12 policies concerning legal services; provides technical supervision over and professional

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5430.25D, *Subject: The General Counsel of the Navy; assignment of responsibilities*; and SECNAVINST  
 5430.7N, *Subject: Assignment of Responsibilities and Authorities in the Office of the Secretary of the*  
*Navy*, 9 June 2005; Marine Corps Order P5800.16A, *Subject: Marine Corps Manual for Legal*  
*Administration*, 31 August 1999; and Secretary of the Air Force Order (SAFO) 111.5, July 14, 2005,  
*Subject: Functions and Duties of the General Counsel and the Judge Advocate General.*

<sup>67</sup> 10 U.S.C. §3019(b).

<sup>68</sup> General Order No. 26, *Responsibility for Legal Services*, paragraph 1, 15 May 1988. Unlike the  
 DoD GC, who is designated the chief legal officer by statute (10 U.S.C. § 140), the Military Department  
 General Counsels are designated the chief legal officer of their Department by their Secretary.

<sup>69</sup> GO 26, paragraph 1d, 15 May 1988.

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1 guidance to all Army attorneys and legal offices; exercises the Secretary's oversight of  
 2 intelligence activities; and serves as the point of contact for legal matters that might  
 3 involve outside agencies.<sup>70</sup>

4 By statute, the Judge Advocate General is the legal advisor to the Secretary of the  
 5 Army and all officers and agencies of the Department; directs judge advocates in the  
 6 performance of their duties; and receives, revises, and has recorded proceedings of courts  
 7 of inquiry and military commissions."<sup>71</sup> TJAG is also charged with various  
 8 responsibilities under the Uniform Code of Military Justice,<sup>72</sup> as well as responsibilities  
 9 for establishing and supervising a legal assistance program<sup>73</sup> and a claims program.<sup>74</sup> In  
 10 addition, the Secretary, by general orders, regulations, and memoranda, has designated  
 11 the TJAG as the military legal advisor to the Secretary of the Army and all officers and  
 12 agencies of the Department.<sup>75</sup> TJAG provides legal advice directly to the Chief of Staff  
 13 and Army Staff, and, in coordination with the General Counsel, to the Secretary and the

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<sup>70</sup> GO 3, 9 July 2002.

<sup>71</sup> 10 U.S.C. § 3037(c).

<sup>72</sup> 10 U.S.C. § 801, *et seq.* Duties include assigning judge advocates; making frequent inspections in the field; supervising the administration of military justice; certifying and designating military trial judges for courts-martial; establishing and referring cases to the Service courts of criminal appeals; reviewing certain courts-martial; and detailing appellate counsel for the accused and for the government.

<sup>73</sup> 10 U.S.C. § 1044.

<sup>74</sup> 10 U.S.C. § 2733

<sup>75</sup> GO 3, 9 July 2002.

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1 Army Secretariat.<sup>76</sup> TJAG is also charged with “staff responsibility for providing legal  
 2 services and for professional guidance to military attorneys of the Judge Advocate  
 3 General’s Corps and to civilian attorneys under his qualifying authority.”<sup>77</sup> Additionally,  
 4 TJAG serves as the principal legal advisor to the Secretary and Chief of Staff on matters  
 5 of military justice.<sup>78</sup>

6 The Army also has attorneys assigned to the Army Materiel Command and the U.S.  
 7 Army Corps of Engineers, who provide legal advice related to their commands’ missions  
 8 and report to the Command Counsel and Chief Counsel, respectively. Both the  
 9 Command Counsel and Chief Counsel report to the General Counsel of the Army.

## 10 **Navy and Marine Corps**

11 The statute establishing the position of General Counsel of the Navy provides that  
 12 the General Counsel “shall perform such functions as the Secretary of the Navy may

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<sup>76</sup> GO 3, 9 July 2002.

<sup>77</sup> GO 26, 15 May 1988.

<sup>78</sup> GO 3, 9 July 2002. The General Order lists 20 specific responsibilities, including directing judge advocates in their duties and providing technical supervision of military legal offices; providing professional legal training for military and civilian attorneys under TJAG’s qualifying authority; serving as career manager for judge advocates; representing the Army’s interests in certain litigation matters; and advising the Chief and Army Staff on environmental law, labor and civilian law, and operational deployment matters.

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1 prescribe.”<sup>79</sup> The Secretary of the Navy has done so through instructions, regulations,  
2 and memoranda. Thus, the General Counsel of the Navy is the chief legal officer of the  
3 Navy and provides or supervises the provision of legal advice and services to the  
4 headquarters on all matters affecting the Department.<sup>80</sup> The Counsel for the  
5 Commandant of the Marine Corps serves as a member of the Department of the Navy’s  
6 Office of General Counsel.<sup>81</sup> Attorneys assigned to the Office of General Counsel and  
7 the Commandant’s Legal Office provide legal services at the headquarters and on-site at  
8 the location of the commands they serve.<sup>82</sup> The General Counsel of the Navy provides or  
9 supervises the provision of legal services throughout the Navy in the areas of business  
10 and commercial law; real and personal property law, intellectual property law, fiscal law;  
11 environmental law; civilian personnel and labor law; ethics and standards of conduct, and  
12 Freedom of Information Act (FOIA) and Privacy Act law, including litigation in these  
13 areas; and assists the Secretary in the oversight of all Department intelligence activities  
14 and law enforcement matters.<sup>83</sup>

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<sup>79</sup> 10 U.S.C. §5019(b).

<sup>80</sup> SECNAVINST 5430.7N, 9 June 2005.

<sup>81</sup> SECNAVINST 5430.25.

<sup>82</sup> Navy Combined Outline of Legal Elements Brief, 27 April 2005, p. 9.

<sup>83</sup> SECNAVINST 5430.7N, 9 June 2005.

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1 By statute, the Judge Advocate General is under the direction of the Secretary of  
2 the Navy performing duties that the Secretary assigns.<sup>84</sup> TJAG is also charged with  
3 various responsibilities under the Uniform Code of Military Justice, as well as  
4 responsibilities for boards for the examination of officers for promotion and retirement.<sup>85</sup>  
5 TJAG provides legal advice directly to the Chief of Naval Operations, and, in  
6 coordination with the General Counsel, to the Secretary. TJAG is also responsible for  
7 providing or supervising the provision of all legal advice and related services, except for  
8 the advice and services provided by the General Counsel.<sup>86</sup> TJAG provides legal and  
9 policy advice to the Secretary on military justice, administrative law, claims, operational  
10 and international law, and litigation involving these matters.<sup>87</sup> The SJA to CMC serves  
11 as legal advisor to the Commandant of the Marine Corps on military justice,  
12 administrative law, operational law, and legal assistance matters, and as the Director of  
13 the Judge Advocate Division, Headquarters Marine Corps. Navy and Marine judge  
14 advocates are responsible for delivering legal services to the Fleet and Fleet Marine  
15 Forces around the world, on land and at sea, in peacetime and in areas of active  
16 hostilities.<sup>88</sup> They are responsible for military justice; operational law, admiralty and  
17 maritime law; environmental law; administrative law, which includes military personnel

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<sup>84</sup> 10 U.S.C. § 5148(d).

<sup>85</sup> 10 U.S.C. § 801, *et seq.*

<sup>86</sup> SECNAVINST 5430.7N, 9 June 2005.

<sup>87</sup> SECNAVINST 5430.7N, 9 June 2005.

<sup>88</sup> Navy Combined Outline of Legal Elements Brief, 27 April 2005, p. 11.

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1 law; standards of conduct and government ethics, FOIA and Privacy Act law; legal  
2 assistance; claims; national security and intelligence law; and litigation involving all of  
3 these areas.<sup>89</sup>

## 4 **Air Force**

5       The Air Force General Counsel is the chief legal officer of the Department, and is  
6 specifically responsible for matters of legal policy, including those involving:  
7 establishment of significant legal precedent affecting established Air Force processes or  
8 practices and large financial consequences; the Department of Defense, other agencies of  
9 the government, foreign countries, and international organizations (including major  
10 international agreements); acquisition, contract, and programs for research and  
11 development; and senior officers and officials of the Air Force.<sup>90</sup> The General Counsel  
12 provides legal advice to the Secretary, Chief of Staff, Commanders of Major Commands,  
13 Program Executive Officers and other senior officials of the Air Force and becomes  
14 involved in and directs resolution of litigation and administrative cases (except those that  
15 are subject to the statutory responsibility of TJAG).<sup>91</sup> Within the Headquarters, the  
16 General Counsel is responsible for and solely authorized to maintain staff dedicated to  
17 providing advice on legal aspects of the Air Force promotion process; intelligence;

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<sup>89</sup> Navy Combined Outline of Legal Elements Brief, 27 April 2005, p. 11.

<sup>90</sup> SAFO 111.5, July 14, 2005.

<sup>91</sup> SAFO 111.5, July 14, 2005.

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counter-intelligence; special access programs; ethics; budgetary and fiscal matters, legislative change proposals, standards of conduct; alternative dispute resolution; and the retention/supervision of outside legal counsel.<sup>92</sup>

TJAG is the legal advisor of the Secretary and of all officers and agencies of the Department of the Air Force.<sup>93</sup> Like the Army TJAG, the Air Force TJAG is charged with administration of the Uniform Code of Military Justice,<sup>94</sup> responsibilities for establishing and supervising a legal assistance program<sup>95</sup> and a claims program,<sup>96</sup> and recording proceedings of courts of inquiry and military commissions.<sup>97</sup> TJAG is also responsible for effective and efficient provision of legal services to operational Air Force commands and units and providing professional supervision over Air Force judge advocates.<sup>98</sup> Professional supervision includes recruiting, training, and certifying, as well as managing assignments and addressing manpower issues.

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<sup>92</sup> SAFO 111.5, July 14, 2005.

<sup>93</sup> SAFO 111.5, July 14, 2005, *citing* 10 USC § 8037.

<sup>94</sup> 10 U.S.C. § 801, *et seq.* Duties include assigning judge advocates; making frequent inspections in the field; supervising the administration of military justice; certifying and designating military trial judges for courts-martial; establishing and referring cases to the Service courts of criminal appeals; reviewing certain courts-martial; and detailing appellate counsel for the accused and for the government.

<sup>95</sup> 10 U.S.C. § 1044.

<sup>96</sup> 10 U.S.C. § 2733

<sup>97</sup> 10 U.S.C. § 801, *et. seq.*; 10 U.S.C. § 2377(a); 10 U.S.C. § 1044(b); 10 U.S.C. § 8037

<sup>98</sup> SAFO 111.5, July 14, 2005; *see also* 10 U.S.C. § 8037.

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## 1 **Organizational Summary**

2 As noted elsewhere in this Report, the Services have unique histories and are  
3 structured differently, and their legal services organizations have evolved differently to  
4 best support their varied Service missions. Although each of the Departments' Office of  
5 the General Counsel and Service TJAG or SJA offices is different, they all effectively  
6 provide high quality legal services to their clients. Military leaders testified that they  
7 proactively seek legal support,<sup>99</sup> and the Military Departments have demonstrated the  
8 ability to adapt their legal teams to rapidly changing requirements. The Panel sees no  
9 merit in imposing the organizational structure of one Military Department's General  
10 Counsel or Service TJAG office on another or in requiring all Military Department  
11 Secretaries to adopt one model for the delivery of legal services. Doing so would  
12 decrease the effectiveness and quality of legal support and inappropriately limit the  
13 Secretaries' discretion to organize the Departments as they see fit.<sup>100</sup>

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<sup>99</sup>See e.g., Testimony of General (Ret) Abrams, Transcript of June 28, 2005 Hearing, pp. 68-69.

<sup>100</sup> Testimony of Dr. Chu, Transcript of June 1, 2005 Hearing, pp. 70-72:

I would acknowledge I am not a big fan of one size fitting all .... I would be a little cautious about insisting everybody look the same.

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## **The General Counsel-TJAG Relationship**

The relationship between the Judge Advocates General and the General Counsels of the Military Departments has been an evolving one, from the earliest days of the Republic, when the Continental Army had a Judge Advocate General with no civilian counterpart, through the middle of the 20th Century, with the introduction of General Counsels, to the present time. For some 50 years or more, there have been in each Department a General Counsel appointed from civilian life and a career military Judge Advocate General, with the former serving as the senior Departmental lawyer, but with the latter not being a reporting subordinate. Both are legal advisers to the Department leadership, and each has responsibility for his/her respective organization. Though properly concerned with the provision of legal services and application of the law throughout the Department, the General Counsel lacks general executive authority over the JAG Corps. Conversely, while responsible for much of the legal work done away from Department headquarters, the TJAG is not the final legal authority, except in matters assigned by statute or the Secretary. Therefore, the TJAG must ensure that important legal issues are elevated from the field to headquarters for review by the General Counsel and Department leadership. Where the incumbent General Counsel and TJAG understand these roles and observe their limitations, tend to defer to one another in areas of relative expertise, and otherwise seek to collaborate, the relationship is productive, the job gets done, and the client—from E-1 to Secretary—is well-served.

The current arrangement has worked well, although it has not always worked perfectly. Put differently, it appears to work for all of the Services most of the time and

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for some of the Services virtually all of the time. Accordingly, and especially in light of recent legislation, the Panel does not perceive any need to reorganize the legal functions within the Military Departments or to restructure the current statutory relationship between the General Counsels and TJAGs. At the same time, however, the Panel believes that greater clarity as to the roles of these two legal officers, as well as attention to the circumstances most conducive to their success, would be beneficial in avoiding the dysfunction that has characterized some General Counsel-TJAG relationships and promoting “a united, cohesive, interdependent collegial and seamless team.”<sup>101</sup> Before focusing on these topics in detail, we provide a brief reprise of the pertinent history.

## ***Historical Summary***

In 1775, the Continental Congress, at the request of General George Washington, established the position of The Judge Advocate General of the Army (TJAG).<sup>102</sup> Since then, the Congress has, at various times over the last 230 years, created positions for uniformed Judge Advocates General in the Navy and Air Force, a Staff Judge Advocate to the Commandant of the Marine Corps,<sup>103</sup> and civilian General Counsels in each of the

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<sup>101</sup> Presentation of the Honorable Togo D. West, Jr., transcript, p. 57

<sup>102</sup> Cite

<sup>103</sup> Unlike the position of Staff Judge Advocate to the Commandant, which was established by statute (10 U.S.C. § 5046, P.L. 89-731), the Counsel for the Commandant position was established by Secretary of the Navy Instruction in 1955 (SECNAVINST 5430.25)

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1 Military Departments and the Department of Defense.<sup>104</sup> The statutory provisions differ  
 2 in time of enactment and in their specific wording. Responsibilities assigned to General  
 3 Counsels and TJAGs have changed over time, based variously on broad statutory  
 4 language, the exigencies of the day, and Secretaries' prerogatives to organize their  
 5 Departments.

6       Until the establishment of the General Counsel, the Judge Advocate General was,  
 7 as a practical matter, the only legal advisor to Department leadership.<sup>105</sup> Accordingly,  
 8 when Congress first created the position, it delineated the Army TJAG as "*the* legal  
 9 advisor to the Secretary."<sup>106</sup> With the creation of the Army General Counsel, first by  
 10 regulation in 1950 and later by statute, the question of which office would have primacy  
 11 was inevitable. Further complicating the discussion, in 2004 Congress described the Air  
 12 Force TJAG as "*the* legal advisor to the Secretary of the Air Force,"<sup>107</sup> mirroring the  
 13 language that existed for the Army since 1948. We do not view the recent use of the  
 14 word "the" as Congressional designation of primacy, but rather as language that aligns  
 15 the Air Force TJAG statutory provision with the longstanding Army provision. The  
 16 Navy TJAG statutory provision contains no such language.<sup>108</sup>

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<sup>104</sup> Cites

<sup>105</sup> Testimony of the Honorable Togo West (page 57 transcripts)

<sup>106</sup> (emphasis added) (cite -- 1948)

<sup>107</sup> 10 U.S.C. § 8037 (emphasis added); *Compare* 10 U.S.C. § 3037

<sup>108</sup> *See* 10 U.S.C. § 5148

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1           Notwithstanding these statutory provisions regarding the TJAGs, the Army, Navy,  
 2   and Air Forces Secretaries, acting on their statutory authority to organize their  
 3   Departments,<sup>109</sup> have designated the General Counsel as the “chief legal officer,”  
 4   “principal legal advisor to the Secretary,” or “final legal authority,” respectively, while  
 5   acknowledging the role of the Judge Advocate General in certain matters, such as  
 6   military justice.<sup>110</sup> The DoD General Counsel, on the other hand, is designated as the  
 7   chief legal officer of the Department of Defense by statute.<sup>111</sup>

8           Independent of these Secretarial actions, Congress has more recently created the  
 9   positions of Military Department General Counsel by statute and subsequently elevated  
 10   those positions. For example, Congress elevated the General Counsels to Level IV of the

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<sup>109</sup> Cites to Military Department Secretaries authorities to OTE.---

<sup>110</sup> Army – General Order #8, 1 April 1975 (The General Counsel is “the chief legal officer of the Army” and responsible for “determining the Army’s position on any legal question or legal procedure”).

Navy – SECNAVINST 5430.25D, 1 December 1977 (The General Counsel is “the principal legal advisor to the Secretary”).

Air Force – SAFO 111.1, 24 May 1955 (Provided that “[t]he General Counsel is the final legal authority on all matters arising within or referred to the Department of the Air Force except those relating to the administration of military justice and such other matters as may be assigned to the Judge Advocate General by Secretary of the Air Force Order.)

<sup>111</sup> 10 U.S.C. §140(b) (“The General Counsel is the chief legal officer of the Department of Defense. He shall perform such functions as the Secretary of Defense may prescribe.”).

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Executive Schedule,<sup>112</sup> putting them on par with the Assistant Secretaries of the Military Departments. Additionally, like other members of the Secretary's senior civilian staff, General Counsels are nominated by the President and confirmed by the Senate<sup>113</sup> and are now specifically included in the order of succession within their Military Departments and the Department of Defense.<sup>114</sup>

As we have seen, when the Goldwater-Nichols Act created the statutory position of General Counsel, it did so with the understanding that there would be some overlap and duplication between the positions of General Counsel and TJAG. However, the legislative history is barren on the question of how these two offices were to interact. The first indication of Congress' position on this issue came in the early 1990s.

In April 1991, the Department of Defense's legislative package to authorize appropriations for fiscal years 1992 and 1993 included a provision to amend the statutes creating the positions of the Military Department General Counsels "to make clear that the general counsels are the 'chief legal officers' of their respective departments."<sup>115</sup> Then-Secretary of Defense Cheney also highlighted the provision in a letter to Senate Armed Services Committee Chairman Sam Nunn and Ranking Member John Warner.<sup>116</sup>

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<sup>112</sup> 5 USC §5315

<sup>113</sup> Cite

<sup>114</sup> Cite

<sup>115</sup> O'Donnell letter, July 3, 1991.

<sup>116</sup> Cheney Letters, June 13, 1991

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1 DoD also proposed to elevate the General Counsels to Level IV of the Executive  
 2 Schedule. Neither provision was included in the House or Senate bills, nor, as a  
 3 consequence, adopted. Within months, however, Deputy Secretary of Defense Atwood  
 4 issued his March memorandum<sup>117</sup> that designated the Military Department General  
 5 Counsels as the chief legal officers of their respective Departments and provided that  
 6 their legal opinions would be controlling within their Departments.<sup>118</sup>

7 As noted previously, the Atwood Memorandum became the subject of  
 8 controversy, perceived by some in the legal community as an attempt to subordinate  
 9 military lawyers to the General Counsels. The implications of the Memorandum were  
 10 explored in some detail in conjunction with the confirmation hearings of David  
 11 Addington to be the DoD General Counsel. In response to questions during his  
 12 confirmation hearing, Mr. Addington acknowledged that some questions were raised by

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<sup>117</sup> Discussed previously *supra* Historical Context and Legislation.

<sup>118</sup> Memorandum, Deputy Secretary of Defense, Dep't of Defense, to Service Secretaries and General Counsels, subject: Ensuring Execution of the Laws and Effective Delivery of Legal Services (March 3, 1992). In addition, the Atwood Memorandum directed that the "civilian and military personnel performing legal duties ... under the Secretary ... shall be subject to the authority of the General Counsel ...." The Atwood Memorandum also indicated that the Military Department General Counsels were "responsible to and subject to" the Military Department Secretaries *and* the DoD General Counsel, in his capacity as DoD's chief legal officer.

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1 the memorandum and that it could be subject to a broader interpretation than intended.<sup>119</sup>  
2 The questions also elicited from Mr. Addington answers that confirmed the independence  
3 of the Judge Advocates General as legal advisors to Department leadership. That litany  
4 of questions and answers has since been repeated verbatim in the pre-confirmation  
5 questions and answers of all nominees for the DoD and Military Department General  
6 Counsel positions.

7 As a result of this interchange, Mr. Atwood issued a revised memorandum, dated  
8 August 14, 1992, which charged the Military Department Secretaries with ensuring that  
9 their General Counsels are designated the chief legal officers of their respective  
10 Departments; that the legal opinions of the General Counsels are the controlling legal  
11 opinions within their Department; and that the memorandum would be implemented in a  
12 manner consistent with statutes relating to the TJAGs.<sup>120</sup>

13 When, in 2003, the Air Force SAFO created a similar concern of subordinating  
14 the TJAG of the Air Force to the executive authority of the Air Force General Counsel,

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<sup>119</sup> Testimony of David S. Addington, nominee to be DoD General Counsel, before the SASC on July 1, 1992. (“Some questions were raised though that there could be by others, a broader interpretation and it has been asked that we just simplify it . . . to eliminate any confusion. Secretary Atwood said he would be happy to do that.”)

<sup>120</sup> Memorandum, Deputy Secretary of Defense, Dep’t of Defense, to Service Secretaries, subject: Effective Execution of the Law and Delivery of Legal Services (August 14, 1993) (Mr. Atwood signed the memorandum as the Acting Secretary of Defense).

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1 Congress, in a Conference Report, demanded the withdrawal of that SAFO and then  
2 passed legislation expressly ensuring the independence of the Service TJAG as a legal  
3 adviser to the Military Department Secretary and the Chief of Staff.<sup>121</sup>

4 The Panel concludes that the structure intended by Congress since the passage of  
5 the Goldwater-Nichols Act is one in that the General Counsel and TJAG each are  
6 independent legal advisers to Military Department leadership, with the General Counsel  
7 being the senior adviser and therefore the adviser whose opinion is “final” at the  
8 Department level. On the other hand, the General Counsel is not to have executive  
9 authority over the TJAG and those reporting to him. And, of course, the DoD General  
10 Counsel provides the “final” legal positions for the Department as a whole.

### 11 ***Balance Between Primacy and Independence***

12 The relationship between the General Counsel and TJAG may be viewed as a  
13 balance between the primacy of the General Counsel and the independence of the TJAG.  
14 The former has found expression in the designation of the General Counsel as the “chief  
15 legal officer” and the notion of final legal authority or controlling legal opinions. As it  
16 relates to the TJAG’s role as a senior legal adviser to the civilian and military leadership,  
17 independence is reflected in the “Addington questions” posed to prospective

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<sup>121</sup> This same independence is preserved for judge advocates in the field with respect to legal  
advice to their commanders. 10 U.S.C. §§3037(e)(2); 5148(e)(2); 5046(c)(2); 8037(f)(2).

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1 appointees<sup>122</sup> and, more recently, was confirmed in provisions of the National Defense  
2 Authorization Act for FY 2005,<sup>123</sup> it is also reflected in certain statutorily assigned  
3 responsibilities, *i.e.*, in the administration of military justice. The Panel sees nothing in  
4 the two concepts that is mutually inconsistent or otherwise incompatible with the  
5 effective performance of legal functions within the Military Departments. In fact, the  
6 Panel believes that the existence of both a civilian General Counsel and a military TJAG  
7 has been an excellent method of ensuring quality legal advice and services. In general,  
8 these attributes are held in equipoise (some would say healthy tension) rather effortlessly,  
9 and the General Counsel and TJAG see to the business of the Department. Where a  
10 General Counsel and TJAG have become embroiled in an unproductive effort to adjust  
11 their relative positions -- which thankfully is not frequent -- the balance is lost. The  
12 Panel's hearings and review of historical materials tend to suggest that misconception by  
13 the incumbent in one or both of these positions as to their proper roles may lead to and  
14 then exacerbate the problem.

**Primacy**

16 In order to maintain balance, it is important to understand what the term Chief  
17 Legal Officer should mean and what it does not mean.

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<sup>122</sup> Insert FN re: questions to appointees.

<sup>123</sup> Cite.

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1           On one level, the designation of Chief Legal Officer as the issuer of “controlling  
2   legal opinions” is largely theoretical because disagreement between the General Counsel  
3   and TJAG on a matter of abstract legal interpretation or straight application of law to  
4   facts is rare.<sup>124</sup> Instead, it is more likely that any divergence of views would turn on  
5   factors that are outside the exclusive purview of either the General Counsel or TJAG.  
6   Policy implications, public reaction, effect on good order and discipline, programmatic  
7   consequences, and budgetary impacts are all legitimate and necessary considerations, but  
8   they are considerations over which neither the General Counsel nor TJAG has a claim of  
9   right to the exclusion of the other, nor indeed to the exclusion of other members of a  
10   Department headquarters. The Panel heard from several senior department officials who  
11   made clear that if there is a difference of legal opinion between the General Counsel and  
12   TJAG, they want to know that a difference exists and why.<sup>125</sup> They also rely on their  
13   military or civilian lawyer for more than just legal advice. In that regard, the Secretary  
14   and other officials are able to seek such advice and input as they see fit, and view the  
15   determination of a Department position as an issue for the Secretary, not one for either  
16   legal counsel.

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<sup>124</sup> Testimony of Mr. Fred Kuhn, Hearing Transcript, June 1, 2005, p. 43.

<sup>125</sup> Testimony of Dr. Chu (we get the best product if we have a free flow of ideas . . . .); testimony of the Honorable Ann Petersen (getting legal advice shouldn’t be “either/or”); Mr. Fred Kuhn (hallmark in making a decision on a course of action).

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1 The designation of Chief Legal Officer also has very practical application and  
2 utility. For example:

- 3 • Externally, a Department should speak with one voice. Thus, in dealing with the  
4 Department of Justice, other federal, state and local agencies, or private parties on  
5 a legal matter, it is important to have identified the official who speaks for the  
6 Department and finally determines its legal position. To be certain, at times  
7 TJAG may represent a Military Department in external discussions through  
8 agreement with the General Counsel – especially in those areas about which judge  
9 advocates have special expertise and experience. And because TJAG does have a  
10 different base of experience and perspective than the General Counsel, he or she  
11 should always be free to independently address matters of importance to our  
12 Nation. As a general matter, the chief legal officer's role as the final legal  
13 authority regarding the Department's position with external entities serves a valid  
14 and useful purpose.
- 15 • Internally, the client is entitled to rely on an authoritative opinion on a legal issue  
16 concerning the Department. To be sure, legal advice is sought and provided at all  
17 levels, and in many cases, from and by judge advocates, who frequently provide  
18 the definitive legal answers in the field. Only in exceptional cases do those issues  
19 require a Department-level resolution, and even then they may be resolved in the  
20 OTJAG. However, in those instances in which the General Counsel opines,  
21 his/her legal opinion is controlling and binding within the department.

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- The General Counsel can also play a constructive role in building a sense of community and common cause among the lawyers, uniformed and civilian, within the department, and in promoting cooperation and efficiency across organizational lines. To be effective, however, this must be done with due deference to the TJAG in his leadership of the judge advocate segment of that community.

Some have asserted that the designation of the General Counsel as the Chief Legal Officer merely implements the concept of civilian control of the military. While the point has some merit, it only goes so far. Civilian control is constitutionally ensured by the commitment of shared authority over the military to the President and the Congress, as further implemented by the statutory direction and oversight exercised by the civilian Secretary of Defense and the civilian Military Department Secretaries. Accordingly, the General Counsel may be correctly viewed as an instrument of the Secretary's civilian control. The legislative history of Goldwater-Nichols underscores the General Counsel's role in civilian control, describing the "appointed civilian subordinates" of the Military Department Secretaries as "[c]ivilian control elements ... distributed throughout the DoD by way of a system of appointive civilian officials"<sup>126</sup> and referring specifically to the General Counsel as "a key assistant to the Secretary ..., particularly on sensitive matters directly related to civilian control of the military ...."<sup>127</sup> The Secretary may exercise his control over the Department by acting through the

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<sup>126</sup> Cite

<sup>127</sup> Cite

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1 General Counsel, *i.e.*, by generally or specifically assigning duties/tasks and delegating  
2 authority, and the Secretary's designation of the General Counsel as the Chief Legal  
3 Officer is itself an exercise of secretarial control.

4 That the General Counsel has a role in civilian control of the military, however,  
5 does not mean that the civilian legal officer necessarily "controls" his/her military  
6 counterpart. The principle of civilian control itself does not require designation of the  
7 civilian as "chief legal officer," and neither a superior reporting relationship nor  
8 department-wide executive authority is created by serving as an instrument of the  
9 Secretary's civilian control. Moreover, the TJAG plays an important role with respect to  
10 civilian control. As a matter of historical practice, the TJAG is often responsive to the  
11 Service Chief and staff (regardless of formal reporting relationship) and, as the senior  
12 military legal adviser, serves a role in reinforcing the principle of civilian control by  
13 giving force to the laws and regulations that govern the actions of military commanders.

14 In sum, the Chief Legal Officer designation reflects the seniority of the General  
15 Counsel as a Presidentially appointed, Senate-confirmed Executive Level IV official. It  
16 indicates the authority of the General Counsel outside the department and (in the  
17 infrequent instances where it is needed) the finality of his/her opinions within it. It  
18 connotes general responsibility and accountability for the legal function, subject to the  
19 Secretary's authority.<sup>128</sup> What it is not is a statement of executive authority over the

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<sup>128</sup> Cite to Mr. Williams's testimony.

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1 TJAG. It does not mean the exclusion of any other voice.<sup>129</sup> It does not establish a  
2 reporting or rating relationship. It does not give the General Counsel license to direct the  
3 TJAG in his views or to silence the TJAG in expressing his views to the client. It cannot  
4 impinge on the TJAG's quasi-judicial role of administering a military justice system.<sup>130</sup>  
5 It does not operate to diminish the TJAG's role as "Senior and Managing Partner" of the  
6 Judge Advocate General's Corps,<sup>131</sup> nor can it interfere with the technical chain of  
7 communication and supervision between superior and subordinate SJAs and the TJAG  
8 authorized by 10 U.S.C. §806b. Moreover, any attempt by a General Counsel to direct  
9 the actions of a field SJA's staff would run afoul of core military operating principles of  
10 chain of command and accountability.

11 In a functional relationship, the General Counsel achieves the requisite balance  
12 between his/her seniority and accountability for legal services and respect for the TJAG's  
13 assigned responsibilities and other equities without invoking the Chief Legal Officer  
14 designation.<sup>132</sup> In our view, the "art" of being a Chief Legal Officer is often the ability to  
15 reach consensus and advance the client's interests without resorting to any formal  
16 authority implied by such a title.

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<sup>129</sup> Cite to Sec. West's testimony.

<sup>130</sup> 10 U.S.C. §801, *et seq.*

<sup>131</sup> 10 U.S.C. §§3037(c)(2); NAVY; AF:USMC

<sup>132</sup> Cite to Mr. Mora's testimony and others.

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## 1 **Independence**

2           Ensuring the independence of the senior military legal adviser to the Secretary is  
3 as important as the concept of primacy or the Chief Legal Officer designation. Although  
4 we conclude that statutory references to “the legal advisor” in statutes creating the  
5 position of TJAG do not mean “exclusive,”<sup>133</sup> it is clear that the TJAG holds a special  
6 relationship directly with the Secretary and the other officers and agencies of the Military  
7 Department. That relationship must not be undermined.

8           Independence carries with it the freedom to formulate views and to communicate  
9 those views to the Secretary, in the form and manner of the Secretary’s choosing.  
10 Consistent with the principle that the Secretary has authority to organize his Department,  
11 it is also the Secretary’s prerogative to specify how matters will be presented, including,  
12 if desired, coordination of legal matters with or through the General Counsel. While it

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<sup>133</sup> The Panel has concluded that the phrase “the legal advisor” in sections 3037 and 8037 of title 10 is not meant to designate the TJAG as the sole legal advisor to the Secretary. A contrary conclusion would be inconsistent with Congressional intent as manifested by the provisions that charged the Secretaries with organizing their Departments, established the General Counsels of the Military Departments, elevated the General Counsels to Level IV of the Executive Schedule, and added them to the Order of Succession. Furthermore, the DoD and Military Departments’ actions to designate the General Counsels as the Chief Legal Officer are a pragmatic implementation of the Congressional provisions establishing the General Counsels and subjecting them to Secretarial authority. Finally, it is apparent that the Service TJAGs have never viewed the word “the” as imbuing them with exclusive authority to provide legal advice to the Secretary and the other officers and agencies of their department.

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1 makes sense to resolve differing views before presenting the issue to the client, where  
2 views of the law, facts or consequences differ, the rigors of examination and discussion  
3 will facilitate better decision making. On matters of significance, the TJAG retains the  
4 right to present his assessment to the decision maker, if the decision maker so permits.  
5 That said, independence is not a license to circumvent the staff process or maneuver  
6 without the awareness of the General Counsel, in derogation of his/her responsibilities as  
7 the Chief Legal Officer. Because the General Counsel may be legitimately concerned  
8 with the effectiveness of the legal function throughout the department, matters of  
9 potential secretarial interest or departmental significance should not be kept from General  
10 Counsel under the rubric of “independence,” but should be brought forward. In short,  
11 independence carries with it the obligation to coordinate.

12 The concept of TJAG independence and access is not new. It has been part of the  
13 Military Departments’ standard operating procedure for decades, embodied in the various  
14 Army General Orders, Secretary of the Navy Instructions, and Secretary of the Air Force  
15 Orders.<sup>134</sup> Nonetheless, in the National Defense Authorization Act for FY 2005,  
16 Congress explicitly prohibited interference with the TJAGs’ ability to give independent  
17 legal advice to the Military Department Secretaries.<sup>135</sup> This additional assurance should  
18 assuage any concern that the TJAGs’ access to their respective Secretaries has been

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<sup>134</sup> Cite

<sup>135</sup> 10 U.S.C. §§3037(e)(Army), 5148(e)(Navy), 5046(c)(Marine Corps), and 8037(f)(Air Force).

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1 curtailed by establishment of the General Counsels and their designation as Chief Legal  
2 Officer.

### 3 ***Fostering a Productive Relationship***

4 The first circumstance identified by the Panel as fostering a productive  
5 relationship between General Counsels and TJAGs is also the most obvious: a shared  
6 willingness to collaborate. While we think it over-simplistic to attribute past problems  
7 entirely to “personality conflicts,” as some observers have, we also recognize that no  
8 organization can be made “personality proof.” Thus, success in the General Counsel-  
9 TJAG relationship turns in the first instance on the willingness of incumbents to eschew  
10 self-aggrandizement and work together on the business of the department.

11 Hallmarks of success also include frequent communication and complete  
12 transparency. Witnesses who appeared before the Panel, regardless of past or current  
13 position, universally cited communication and transparency as keys to a successful  
14 relationship. Where these attributes were in place and working, we are not aware of any  
15 instance in which serious “turf battles” developed or a General Counsel-TJAG  
16 relationship faltered. Even in those areas where one or the other might claim a superior  
17 expertise or specific responsibility, communication on matters of mutual interest can only  
18 serve to enhance the quality of legal advice given. For example, while the TJAG has  
19 statutory responsibilities in the area of military justice, if the Secretary is required to take  
20 action under the UCMJ, it is appropriate for the TJAG to coordinate with the General  
21 Counsel. Likewise, the General Counsel should coordinate with TJAG regarding issues

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for which the General Counsel is primarily responsible and that impact operations for which judge advocates are the advising lawyers.

### ***Assigning Areas of Practice***

Some of the witnesses suggested that relationships and responsibilities could be clarified by assigning the lead in certain areas to either the General Counsel or TJAG. While there may be some utility in doing so, the Panel acknowledges that it is the prerogative of the Service Secretary. The Panel believes it is preferable to settle on a working understanding of which legal officer or organization has the expertise, resources, and equities, and to solicit the other legal officer or organization to defer.<sup>136</sup>

Within the Department of the Navy, there has been greater reliance on a general division of labor between the General Counsel and TJAG organizations, with the former tending to handle the legal work of the “shore establishment” or business side of the Navy and Marine Corps (*e.g.*, acquisition, installations, labor) and the latter developing the core competencies required by the “Fleet” or forces forward deployed (*e.g.*, military justice, law of armed conflict). The Army and Air Force, historically garrisoned forces with smaller General Counsel organizations situated principally within the Secretariats,<sup>137</sup>

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<sup>136</sup> See testimony of General Williams, Transcript of June 28, 2005 hearing, p. 152.

<sup>137</sup> The Air Force TJAG, in his presentation and submission, expressed concerns about the expansion of the GC office at home and abroad. The Panel has not studied this issue and expresses no opinion. The issue may warrant further study by the Air Force.

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1 have not adopted the same model, but have been well served by respecting the relative  
2 expertise of the TJAG organizations in matters of military justice and operational law.

3 It would be unwise to impose the same division of labor across all Services in  
4 light of their diverse organizational structures and missions, not to mention the unique  
5 historical climate and culture of each. Within a given department, however, conflict may  
6 be minimized by using some general means of determining lead responsibility for matters  
7 as they arise, absent the need for a specific judgment in the particular instance.

8 The Panel also heard a good deal of testimony concerning the area of practice  
9 loosely denominated as “operational law.” According to Army Field Manual (FM) 27-  
10 100:<sup>138</sup>

11 Operational Law is that body of domestic, foreign, and  
12 international law that directly affects the conduct of  
13 operations. The *practice* of Operational Law consists of  
14 legal services that directly affect the *command and control*  
15 and *sustainment* of an operation. Thus, Operational Law  
16 consists of the command and control and sustainment  
17 functions of legal support to operations. Support functions  
18 are an integral part of legal support to operations; however,  
19 they are treated separately ...

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<sup>138</sup> *Legal Support to Operations*, March 2000:

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1           The Panel notes that military operations in general are within the purview of the  
2   Combatant Commands, the Joint Staff and OSD. Operational law issues are generally  
3   resolved at the combatant command level by staff judge advocates. Every commander  
4   who testified stressed the importance, indeed the criticality, of having his SJA at his side  
5   as part of his leadership team during hostile operations. Service Chiefs and the  
6   Commandant generally rely on their TJAG/SJA to provide counsel in this area of law.  
7   That said, it is important to note that it is not an area of practice exclusive to uniformed  
8   lawyers. Much of what happens in a modern military operation is affected, indeed  
9   constrained, by international agreements and general principals of international law and  
10   by policies established at the DoD or national level. The General Counsels often have a  
11   significant role, especially if the issue is one that involves the Service Secretaries, or falls  
12   within areas of practice on which the GC maintains legal expertise.

### 13   ***Role of the JAG Schools***

14           Each Military Department operates a school for the continuing instruction of  
15   judge advocates. These are the Air Force Judge Advocate General School, the Naval  
16   Justice School, and the Army's Judge Advocate General's Legal Center and School. All  
17   of the schools provide extensive initial training in the Military Justice system of the  
18   United States Armed Forces, and in the military legal practice to new judge advocates, in  
19   addition to advanced instruction in a wide variety of criminal and civil law specialties.  
20   The Army's Legal Center is also an American Bar Association-accredited, Master of  
21   Laws-degree granting institution.

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1           The JAG Schools are a microcosm of the culture of the JAG organizations. They  
2 play a pivotal role in the development of judge advocates at each stage of their careers,  
3 starting with the JAG basic courses, career legal education courses, and specialized legal  
4 education courses. The Panel has been advised that civilian and military attorneys  
5 assigned to the respective Offices of the General Counsel have acted as guest instructors  
6 and panel members for courses at all of the JAG Schools. The JAG Corps of each of the  
7 Services have also invited their General Counsels to address various judge advocate legal  
8 conferences. In addition, the Air Force JAG Corps has included their General Counsel  
9 among the speakers invited to address classes of new judge advocates when they are  
10 brought to the Pentagon for orientation.

11           These are all examples of mutually productive interaction between the GC and  
12 JAG organizations. The Military Departments should not overlook the opportunity to  
13 make greater use of their JAG Schools to foster a better understanding of the respective  
14 roles of JAG organizations and Military Department General Counsels. In particular, it  
15 would be productive for the JAG Schools to regularly invite their General Counsels, to  
16 provide their perspective to students, especially those attending basic and career judge  
17 advocate courses. It is important that judge advocates understand early in their careers  
18 both elements of the team that tackles their Department's legal issues.

19           Likewise, while recognizing the demands on their schedules, the Panel believes it  
20 would be fruitful for General Counsels to accept such invitations whenever possible. The  
21 Panel also notes that this interaction will afford the General Counsels an opportunity to

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observe first hand the unique skills and strengths judge advocates bring to the practice of law within the Department of Defense.

### **Professional Development and Supervision of Civilian Attorneys**

#### ***Professional Supervision***

Professional supervision, as distinguished from rating authority or command relationship, means oversight of the qualifications, competency, and ethical requirements of subordinates by a supervisory attorney.

Both state and federal law provide the authority for the supervision of DoD attorneys. States oversee the legal profession. To be designated as a judge advocate or to be employed as a civilian attorney, a lawyer must be a member in good standing with the attorney's licensing state, including compliance with their standards of professional conduct. Most states have adopted some form of the American Bar Association Model Rules of Professional Conduct. Model Rule 5.1, Responsibilities of Supervisory Lawyers, imposes an obligation on lawyers to ensure subordinate lawyers are adequately trained and are fulfilling their responsibilities to their clients in accordance with the ethics rules.

Each of the Military Departments has designated a "qualifying authority" that must certify the professional qualifications of attorneys hired by the Department. Qualifying authorities have a continuing responsibility to ensure compliance by personnel under their authority with the rules of professional conduct for lawyers.

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1 ***Professional Development***

2 Comprehensive and effective programs for the professional development of career  
3 attorneys in the Department of Defense, both uniformed and civilian are critical to  
4 ensuring the Department receives quality legal services. Each of the Military  
5 Departments has a robust system for the professional development of judge advocates,  
6 with appropriate educational and training opportunities tailored to each phase of their  
7 careers. Historically, professional development programs for civilian attorneys, with few  
8 exceptions, have not been as comprehensive or well-structured. As a general rule, the  
9 smaller the pool of civilian attorneys covered by a career program, the more difficult it  
10 becomes to offer significant career broadening opportunities.<sup>139</sup>

11 This imbalance in professional development opportunities would appear to flow  
12 from the distinctly different leadership and management programs that have traditionally  
13 been applied to judge advocates and career civil service attorneys. In the course of their  
14 careers, judge advocates are expected to succeed in a variety of legal disciplines across a  
15 spectrum of command levels, from small, forward-deployed units to the most senior  
16 headquarters offices in the Pentagon. In some respects, the professional education

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<sup>139</sup> The testimony and submissions indicate that the Department of Navy Office of General Counsel, AMC, and USACE have been effective in leveraging the opportunities created by large organizations, working in numerous areas of practice, to build a meaningful career development programs.

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1 requirements for judge advocates are broader because of the necessity for professional  
2 military education.

3       Civilian attorneys, by contrast, like civil servants in other career fields, are  
4 traditionally hired to perform a specific job at a specific location. While this is slowly  
5 changing, the vast majority of civil service attorneys have not been expected to sign  
6 mobility agreements. As such, and unlike the judge advocates with whom they serve,  
7 civil service attorneys are generally not required to change their duties or geographic  
8 location at the discretion of the Military Departments. Career development has largely  
9 been viewed as the personal responsibility of each civilian attorney.

10       In addition, the personnel system governing civil service attorneys has provided  
11 supervisors less flexibility in back-filling vacancies created by employees participating in  
12 lengthy career broadening or educational opportunities, than exists for judge advocates.  
13 This has acted as a practical disincentive to providing such opportunities to civilian  
14 attorneys on a widespread basis.

15       While these facts explain the practical reasons why the Military Departments have  
16 devoted far more time and resources to judge advocate development, the existing  
17 imbalance is not in the best interests of the Department of Defense. It appears this  
18 professional development deficiency is now widely recognized. From the submissions  
19 received by the Panel, it is clear that all of the Military Departments are now either  
20 strengthening programs for civilian attorney development or creating Department-wide  
21 programs where none existed in the past.

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1 The Panel applauds these efforts to bring a systematic approach to the  
2 professional development of career civil service attorneys. A more energetic system of  
3 civilian attorney career development, while valuable in and of itself, should also provide  
4 the collateral benefits of greater retention rates and a stronger shared frame of reference  
5 with uniformed attorneys.

6 Appendix \_\_\_\_ of this Report contains a more detailed discussion of the  
7 professional supervision and development of attorneys in the Military Departments and  
8 Department of Defense, including those assigned to Unified Commands.

## 9 **Legal Support for the Joint Commands**

10 Unified and Specified commands are designated by the President, through the  
11 Secretary of Defense, with the advice and assistance of the Chairman of the Joint Chiefs  
12 of Staff. There are currently no Specified commands, but the option to create such a  
13 command still exists. There are nine Unified Commands within the Department of  
14 Defense: Central Command, European Command, Joint Forces Command, Pacific  
15 Command, Northern Command, Southern Command, Special Operations Command,  
16 Strategic Command and Transportation Command. The distinctive features of Unified  
17 commands are that they are composed of forces from two or more Military Departments  
18 and have broad and continuing missions. Five of these commands have responsibility for  
19 war plans and operations in specified portions of the world, known as areas of  
20 responsibility (AORs). Regardless of whether a Unified Command has a combatant  
21 mission, all exercise command authority independent of the Military Departments.

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Unified Commanders have full authority to organize and employ commands and forces assigned to them as the commander determines is necessary to accomplish assigned missions. For ease of reference, all of these organizations will be collectively referenced in this report as “joint commands.”

### ***Legal Services in the Joint Environment***

Military attorneys serve at every level of command of joint forces just as they do within the Service hierarchy. While the structure of these commands varies, they generally have a single joint forces commander, with an organic staff, supported by functional component commanders (such as the Joint Forces Air Component Commander or Joint Forces Land Component Commander) and their subordinate staffs. The typical joint command headquarters legal staff includes six to nine attorneys, although Northern Command is a notable exception with seventeen. These attorneys are active duty, National Guard, and Reserve judge advocates and DoD civilian employees. The component commanders’ staffs have similarly sized legal elements typically comprised of military judge advocates. The size of a forward-deployed staff is often constrained by the amount of logistical support available as well as the political sensitivities of the host nation.

Below the component command level, fielded forces are typically organized according to Service doctrine. For example, while both Air Force and Naval aviation units support the Joint Forces Air Component Commander, they are deployed as single-Service wings or groups whose activities are integrated at the component commander

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level. These forces generally have integrated legal support as well. Increasingly, these wing, brigade, and strike group judge advocates find themselves confronting new legal challenges that test the entire organization's ability to provide timely and accurate legal advice to commanders.

## **Command Doctrine for Joint Operations**

Joint operations take place in overlapping contexts that involve both the joint commanders and Military Departments. Operational direction, joint training, and strategy fall under the joint commander. The day-to-day administration, training, and personnel actions are generally the province of the Military Departments. Since Goldwater-Nichols, all forces are assigned to one of the Unified Commands. The degree to which joint command or Service authority predominates depends greatly on the particular mission of individual units.

Joint Publication 3-0 sets out doctrinal concepts of command authority. Command over fielded forces flows through a single chain of command with two distinct branches. For operational direction of forces and missions assigned to combatant commands, authority flows from the President, through the Secretary of Defense, to the commander of the combatant command. For purposes other than operational direction of forces assigned to a combatant command, authority runs from the President through the Secretary of Defense to the Secretaries of the Military Departments. These two lines of authority are usually called combatant command (COCOM) and administrative control (ADCON). ADCON generally runs from the Military Department Secretary through the

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1 Service Chief to the senior Service commander assigned to a particular combatant  
2 command. When COCOM and ADCON authorities conflict, COCOM authority takes  
3 precedence.<sup>140</sup>

4 Under joint and Service doctrine, much of the ADCON responsibility is delegated  
5 to the senior Service commander in the joint command. Under this doctrine, the  
6 component commander, who is often also a senior Service commander, exercises  
7 delegated aspects of both ADCON and COCOM authority. Responsibility for discipline,  
8 logistics, and personnel actions, for example, would be delegated from the Service major  
9 command commander to the component commander (or senior Service deputy)  
10 responsible for those forces in theater.

11 The bottom line of both COCOM and ADCON is mission accomplishment.  
12 Legal services, like other element of support, must focus on that goal. Legal elements  
13 must be organized to meet the needs of operational commanders. Military Departments,  
14 joint commanders, and their legal staffs must work together to accomplish the mission.

## 15 Legal Support from the Field Perspective

16 Legal support within the joint command for COCOM issues comes from a variety  
17 of sources in theater, at intermediate Service headquarters, and at the DoD level. The  
18 focal point for all these sources within the joint commands is the commander's staff

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<sup>140</sup> See 10 U.S.C. §165.

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1 judge advocate. Attorneys outside the command who render advice directly to field  
2 commanders are expected to close the loop with the servicing judge advocate office to  
3 ensure consistency and promote complete understanding of the legal environment.

4 The servicing staff judge advocate can seek specialized advice or additional  
5 resources to address legal issues arising in the AOR through a process generally called  
6 reach-back. It can occur both formally and informally. Formal reach-back relies on  
7 resources within the chain of command responsible for a given issue. Informal reach-  
8 back, by contrast, uses sources of expertise from throughout the defense community.

## 9 **Formal Reach-back**

10 Formal reach-back, with its reliance on command channels, draws heavily from  
11 joint and Service doctrine to establish lines of authority. Since Title 10 establishes  
12 different chains of command for COCOM and ADCON functions, the source of reach-  
13 back assistance depends on the nature of the issue. Some issues fall clearly under one  
14 authority or the other. For example, rules of engagement or allegations of violations of  
15 the law of armed conflict pertain directly to the operational control of forces. Formal  
16 reach-back regarding these issues would go through the COCOM chain of command.<sup>141</sup>  
17 In contrast, issues related to readiness, mobilization, or discipline fall under the Military

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<sup>141</sup> As a practical matter, even in formal reach-back, the General Counsels may provide legal services related to COCOM issues by virtue of designation of a Military Department Secretary as executive agent or delegation of DoD authority to a Military Department Secretary.

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1 Department ADCON responsibility. Issues related to these matters would flow up the  
2 Service chain of command. Judge advocates and civilian attorneys in the Global War on  
3 Terrorism must resolve which of these two authorities apply to the broad array of issues  
4 that do not fall neatly into one line of authority or the other. The vast majority of issues  
5 can be resolved locally or informally. The decision on which chain of command to use  
6 for ambiguous issues that must be resolved formally generally falls to the commander in  
7 consultation with his or her staff judge advocate.<sup>142</sup>

8 Formal reach-back regarding issues under COCOM authority remains within the  
9 joint chain including the Legal Counsel to the Chairman of the Joint Chiefs of Staff and,  
10 if necessary, DoD General Counsel. Sometimes the questions presented are legal  
11 questions that do not require Service-specific analysis. Often, however, a question is  
12 presented as a mixed question of law and fact, such as whether a local commander may  
13 employ a weapons system or reconnaissance asset in a particular fashion. The Joint Staff  
14 may refer these issues to the Military Departments for Service-specific positions.<sup>143</sup>  
15 Service Chiefs may seek legal advice from a Military Department source, including their  
16 General Counsel, but they do so in their Joint Chiefs of Staff role, rather than their  
17 Service ADCON role.

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<sup>142</sup> Brig Gen Eric J. Rosborg discussed how this distinction between COCOM and ADCON issues often affects whether a commander seeks out joint or Service JAG support. *See* Transcript, June 2, 2005, p 69.

<sup>143</sup> Testimony of CAPT Dronberger, Transcript, Jun 2, p 102.

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1 For ADCON issues, formal reach-back stays within the joint command until it  
2 reaches the senior Service commander level, and then flows along Service channels. For  
3 example, a request for reassignment based upon an assertion of conscientious objector  
4 status would be governed by ADCON authority. Legal advice pertaining to such a  
5 request would start with the local commander's staff judge advocate and flow through  
6 component channels to the senior Service commander. From there, the issue would be  
7 forwarded back to the major command within the Service, and, if necessary, to Military  
8 Department headquarters.

9 While highly constrained, this process of formal reach-back serves important  
10 interests for the small number of cases which require such coordination. First and  
11 foremost, it preserves the authority established in law for combatant commanders. Many  
12 legal issues do not involve a clear yes or no answer. The formal reach-back process  
13 allows the operational commander responsible for mission accomplishment to make the  
14 decisions regarding allocation of legal risks. It also ensures the flow of information  
15 regarding legal issues reaches the commanders who most need to act on it. Finally,  
16 formal reach-back is authoritative. Because it follows the chain of command appropriate  
17 to the nature of the legal issue, commanders can act on the guidance knowing that their  
18 resolution of the issue comports with the applicable command or Service objectives.

19 Ultimately, it is the DoD General Counsel who is responsible for providing  
20 guidance and resolution when legal issues are elevated above the Unified command level.  
21 The Secretary of Defense has, through the publication of DoD Directive 5145.1, *General*  
22 *Counsel of the Department of Defense*, given the General Counsel wide-ranging legal

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1 policy and oversight responsibilities for all of the DoD Components, to include the  
2 unified commands. Section 5 of this Directive gives the DoD General Counsel the  
3 authority to issue “instructions to the Combatant Commands” through the Chairman of  
4 the Joint Chiefs of Staff. It appears to the Panel that the Chairman’s Legal Counsel (LC)  
5 plays a pivotal role in facilitating reach-back legal support for the joint commands, to  
6 include acting as a liaison between those commands and DoD General Counsel.

7 The Panel has been advised that the DoD General Counsel meets daily with the  
8 Chairman’s Legal Counsel. They discuss key legal issues, including those raised by or  
9 affecting the combatant commands. Each of the seven Deputy General Counsels, and the  
10 lawyers in their offices, also meet frequently with their counterparts in the Office of the  
11 Chairman’s Legal Counsel and the Military Departments. Both Chairman’s Legal  
12 Counsel and the DoD General Counsel have informed the Panel that they work in close  
13 coordination to ensure that pending legal issues are resolved expeditiously.

14 Lawyers from both the Office of Legal Counsel to the Chairman and DoD  
15 General Counsel informed the Panel that they are members of their respective crisis  
16 action teams.<sup>144</sup> When fully activated, both teams are manned 24 hours a day, seven days  
17 a week with legal representatives. Based upon the written submissions and presentations  
18 by numerous witnesses, it appears to the Panel that both crisis action teams and their

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<sup>144</sup> During a crisis, both the Joint Staff and the Office of the Secretary of Defense activate crisis  
action teams.

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1    respective lawyers work closely together. The crisis action team process provides the  
2    combatant commands and their lawyers with another method of seeking legal support  
3    during a crisis. Of course, joint command lawyers may also seek advice through routine  
4    channels.

### 5    **Informal Reach-back**

6            For those issues that do not require formal coordination, informal reach-back  
7    provides a more flexible and responsive alternative. Especially for SJAs of subordinate  
8    units, even routine legal issues may require more expertise or manpower than the local  
9    unit can provide. Informal reach-back describes the common-sense approach of reaching  
10   out to well-known experts or former associates who have expertise in the required area  
11   for help. Some Services have resource centers that specialize in operational law  
12   questions with a view towards providing deployed attorneys with an informal resource to  
13   help solve common commander's legal problems. These alternatives really reflect two  
14   different approaches to informal reach-back: ad hoc reach-back and centers of excellence.

### 15    Ad Hoc Reach-Back

16            Ad hoc reach-back describes the long-standing practice of reaching out to  
17   personal associates, mentors, and subject matter experts to handle issues that fall outside

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1 an attorney's core area of expertise.<sup>145</sup> This practice, common in both military and  
2 civilian settings, broadens attorney competency in an inherently efficient way.<sup>146</sup>  
3 Accountability for the accuracy and completeness of the resulting advice to the client still  
4 rests with the attorney providing the advice. To some degree, this distinguishes ad hoc  
5 reach-back from other forms of reach-back. When assistance is provided from higher  
6 command or a recognized center of excellence, the client can treat the advice as  
7 authoritative. Ad hoc reach-back, accordingly, is most effective when the attorney and  
8 client have a well-established relationship. The client only has to deal with one attorney.  
9 However, when circumstances present no opportunity to develop a trust-based  
10 relationship, other sources of reach-back may enhance the credibility of the advice.

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<sup>145</sup> BGEN John F. Kelly described his JAG's use of this process and specifically noted the benefit of reducing the number of people deployed to dangerous locations.

<sup>146</sup> Witness testimony demonstrated that the legal community in DoD and the Military Departments respond to questions from lawyers in the field in a timely and efficient manner. For example, Mr. Robert Hogue, Counsel for the Commandant, testified that if a call comes in from the field for advice on matters that overlap Military Department Secretary and Service Chiefs responsibilities, his office will take the issue, contact the appropriate channels at Headquarters, and coordinate a response. Testimony of Mr. Robert Hogue, Hearing Transcript, May 19, 2005, pp.6,16. This process is transparent to the field attorney asking the question.

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Centers of Excellence

Organizational created centers of excellence provide an alternative to both formal reach-back and ad hoc reach-back. Such centers offer the flexibility of informal reach-back, but also serve as clearinghouses for the most current understanding of legal issues. Because the Services sponsor and staff these centers as full-time activities, the lawyers assigned to them typically have both a substantial background in that area of the law and can provide support to judge advocates in the field by responding to requests for assistance. The Army has taken this approach in its Center for Law and Military Operations, known as CLAMO. While CLAMO falls outside the joint chain, the Army, Marine Corps, and Coast Guard have assigned attorneys to the center full-time. In addition to the U.S. active-duty military officers, lawyers from the National Guard, the State Department, and two foreign countries provide interagency and coalition capability. This approach gives CLAMO attorneys substantial expertise and the ability to collect and analyze legal issues that arise during all phases of military operations; disseminate this and other operational information through publications, instruction, training, and databases accessible to operational forces worldwide; respond to field judge advocates' requests for assistance; integrate lessons learned from operations and combat training centers into emerging doctrine and into training curricula; and sponsor operational law conferences and symposia.

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## Legal Support to Joint Commands in Practice

Legal support for joint commands and operations can be synopsized around the following foundational principles:

- Joint command lawyers are responsible for providing legal advice to their commanders, their command staffs and subordinate units in the operational chain of command.
- The Office of the DoD General Counsel is ultimately responsible for providing definitive legal guidance to the joint commands on all legal issues, regardless of subject matter.
- The Chairman's Office of Legal Counsel, while not having independent statutory authority, acts on behalf of the Chairman, supporting his broad statutory authority as the principal military advisor to the President and therefore plays a critical liaison role between the Staff Judge Advocates of the joint commands and the DoD General Counsel.
- The Judge Advocate Generals and Service General Counsels, in their respective areas of expertise, provide a reach-back capability for the Service components of the joint commands.

From the testimony presented before the Panel, commanders and legal staffs in joint commands use all of the available forms of "reach-back," both formal and informal.

In answering a question about how joint commanders and their legal staffs determine

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1 which of the available reach-back channels are appropriate for various issues, the DoD  
2 General Counsel responded as follows:

3                   GENERAL COUNSEL HAYNES: ...I would  
4                   suggest that one shouldn't look at it as a choice among  
5                   exclusive options but, rather, ought to take those multiple  
6                   channels as opportunities to get more help....So with  
7                   multiple channels, I think you can in a timely way reach  
8                   back through two or three...different channels...through  
9                   the Joint channel, through the Army channel, through the  
10                  Air Force channel...Now if there is a dispute, where do you  
11                  go? At that point, I think you have to go...up to the  
12                  combatant commander's SJA and then up through the Joint  
13                  Staff to the General Counsel's office for a definitive  
14                  answer.<sup>147</sup>

15                In the same vein, the present Chairman's Legal Advisor described how this reach-  
16                back process works in practice when issues from the joint commands reach the Pentagon  
17                legal community:

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<sup>147</sup> June 1, 2005 Presentation of Honorable William J. Haynes II, General Counsel of the  
Department of Defense, transcript at pp. 110-111

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1 CAPTAIN DRONBERGER: [Office of Legal  
2 Counsel and General Counsel] can reach a coordinated  
3 response in a relatively short timeframe, if it's necessary.  
4 So, my view on how this should be handled, [field  
5 attorneys] ought to go up through the operational chain of  
6 command, which means that CENTCOM also needs to be  
7 informed, because individual answers to an individual unit,  
8 [do] not ensure consistency across the board....I do  
9 understand the reachback to the Services, I do understand  
10 that they have expertise....there isn't an issue that I can  
11 think of, that we've dealt with over the past year and a half,  
12 where I have not tried to also bring in, in every instance,  
13 the Service reps.<sup>148</sup>

14 The above recitations are consistent with the comments of all the witnesses who  
15 appeared before the Panel on the subject of legal support for joint commands. These  
16 witnesses included uniformed and civilian attorneys, as well as commanders and former  
17 commanders with extensive joint experience, to include the Director of the Joint Staff.  
18 None of these witnesses expressed the opinion that the current system of reach-back legal  
19 support for the joint commands was "broken," or cited any specific examples of the DoD  
20 legal community failing to meet the legal needs of joint forces commanders.

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<sup>148</sup> June 2, 2005 Presentation of Captain Dronberger, transcript pgs 87-88.

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1           Nevertheless, while the evidence before this Panel establishes that the Defense  
2   legal community places appropriate importance on the needs of joint commands, and has  
3   performed admirably in supporting those commands, there may be merit to expanding  
4   this capability. It is apparent to the Panel that since the attacks of September 11, 2001,  
5   there has been a significant increase in not only the number and complexity of legal  
6   issues arising in the joint commands, but also in the speed with which those issues must  
7   be addressed. Indeed, Mr. Daniel J. Dell 'Orto, the DoD Principal Deputy General  
8   Counsel, commented on the increasing need for fast, responsive answers to complicated  
9   legal issues arising out of combat operations. The crisis action team described on page  
10   73 meets that need to a considerable degree. One way to expand that capability is to  
11   create a larger group of legal experts to serve as augmentees to that team. These  
12   augmentees would come from the Service legal staffs, civilian and military, and would be  
13   assigned to temporary full-time duty on the team in the event of crisis. Augmentees  
14   could be identified and trained in advance to promote rapid integration into the crisis  
15   team.

### 16   ***Alternatives to the Formal/Informal Reach-Back Approach***

17           An alternative approach for providing support for attorneys assigned to joint  
18   commands engaged in or supporting combat operations is a center of excellence  
19   sponsored by, and responsible to, the joint staff or directly to the DoD General Counsel.  
20   In many ways, this alternative would combine the benefits of all the various modes of  
21   reach-back. Field attorneys could go directly to an authoritative source, within the

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1 responsible chain of command, that would have both the resources and expertise to  
2 resolve joint forces commanders' legal issues.

3       Such an approach would not come without a price. Joint resource centers require  
4 substantial overhead in both facilities and personnel that take resources away from  
5 Service priorities. The center of excellence concept assumes that the attorneys specialize  
6 full-time in that area of the law. The Panel recognizes that dedicating a staff of sufficient  
7 size to handle contingency-level workloads would probably come at the expense of  
8 staffing other offices. Sustaining such a manning level when the contingency-level  
9 workload no longer exists would be inefficient. A staffing model that relied on a central  
10 cadre of full-time attorneys with designated augmentees for contingency operations might  
11 relieve some of that burden. Augmentees could complete advanced training, while still  
12 assigned to other duties. In many respects however, augmenting the joint staffs directly  
13 would make more efficient use of temporarily assigned personnel. Operational  
14 commanders who testified stressed the importance of first-hand knowledge of the  
15 environment in resolving operational legal issues.<sup>149</sup>

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<sup>149</sup> “That individual JA could not have been on the end of an e-mail string, or on the end of a phone line from somewhere else. He needed to be standing next to me 18 hours a day, understanding the environment, and understanding my objectives with respect to the conduct of the air operation out of the base I was at.” Brig Gen Eric J. Rosborg. Transcript, Jun 2, 2005, p 38; “I wanted my lawyers, my military lawyers, to be with me all the time just so they could see the richness, and the depth, and the complexity of what these young pilots were facing, and the young Marines, and Special Forces that I had to

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1           The Panel does not believe this or any other option represents a “silver bullet” for  
2   addressing the concerns raised by Mr. Dell’Orto concerning the provisioning of prompt  
3   legal services. The Panel is also mindful of the statutory responsibilities of the Secretary  
4   of Defense to organize the Department of Defense, to include legal services. However,  
5   the Panel believes there is merit to further analysis of the existing resources, procedures  
6   and authorities for addressing legal issues raised by the joint commands to the Joint Staff  
7   and OSD.

## 8                           **Strengthening the Legal Community**

9           It is clear to this Panel, from the testimony and written submissions, that civilian  
10   and military lawyers are integral to the mission of DoD. Attorneys are providing critical  
11   and time-sensitive advice to operational commanders and staff. The legal practice areas  
12   in DoD and the Military Departments have become far more demanding and complicated,  
13   requiring greater resources and expertise for lawyers to continue delivering high quality  
14   services.

15           Civilian and military lawyers are most effective when engaged early in the  
16   process and made a part of the organization’s senior management team. At the Military  
17   Department Headquarters level, this team includes the Assistant Secretaries and Deputy  
18   Chiefs of Staff who share common attributes of appointment and grade reflective of the

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push in, that we couldn't conceivably give them every single rule with clarity...” VADM John G. Morgan,  
Jr. Transcript, Jun 2, 2005, p 29.

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breadth and importance of their responsibilities. The General Counsels and Judge Advocates General have responsibilities commensurate with that level of leadership. To recognize these responsibilities and to reflect the importance of the rule of law, the Panel sees great merit in maintaining the positions of the General Counsels as Presidentially appointed, Senate confirmed officials, and in elevating the grades of the Judge Advocates General and the Staff Judge Advocate to the Commandant.

### ***General Counsels as Presidentially Appointed, Senate***

#### ***Confirmed***

As described in the History section above, the DoD General Counsel of the Department of Defense has been a Senate confirmed position (PAS) since 1953, and the Military Department General Counsels have been PAS officials since 1988. The status of General Counsels as PAS officials reflects the responsibility and accountability inherent in the position, and enhances the delivery of legal services to DoD and the Military Departments. As PAS officials, the General Counsels are on equal footing with the Assistant Secretaries and PAS officials in other Departments, and are able to participate in the formulation of policy and legal affairs early in the process when it is most effective. In addition, PAS status provides the Senate with a voice in the appointment of personnel to leadership positions in DoD and the Military Departments.<sup>150</sup>

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<sup>150</sup> The importance of designating the GC as a PAS position was underscored in the testimony of the Honorable Craig King, former General Counsel of the Navy. Mr. King testified that having Senate

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General Counsels holding PAS status has other significant implications. In 1994, Congress added the General Counsels to the order of succession to Secretaries of the Military Departments.<sup>151</sup> Congress stated that the reason it raised Military Department General Counsels to Level IV of the Executive Schedule was to make them “equal in rank to the Assistant Secretaries,”<sup>152</sup> all of whom have PAS status. The authority and stature of holding a PAS office has assured the General Counsel of providing timely and effective service to the Military Departments. For example, the Honorable Alberto J. Mora, General Counsel of the Navy, testified that he served as Acting Secretary of the Navy on three different occasions since becoming General Counsel.<sup>153</sup>

### ***Grades of TJAGs and SJA***

Under current law, the Judge Advocates General (TJAGs) for the Army, Navy and Air Force serve as two star general or flag officers.<sup>154</sup> The SJA to the Commandant

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confirmation put him in a position to identify and address legal issues early in the process and “enabled me to help structure solutions and actions in ways that prevented problems, took account of legal authorities, and [was] much more healthy for the Department . . .” Hearing Transcript, June 15, 2005, p. 286.

<sup>151</sup> National Defense Authorization Act for Fiscal Year 1995, P.L. 103-337, § 902 (1994); 10 U.S.C. §§ 3017 (Army), 5017 (Navy), 8017 (Air Force).

<sup>152</sup> 140 Cong.Rec.S. No. 51, 103<sup>rd</sup> Cong., 2<sup>nd</sup> Sess., at 5053, 5062 (May 3, 1994); 5 U.S.C. § 5315

<sup>153</sup> Hearing Transcript, May 18, 2005, p. 203

<sup>154</sup> 10 U.S.C. §§ 3037(a) (Army), 5148(b) (Navy), and 8037(a) (Air Force).

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1 of the Marine Corps serves as a one star general officer.<sup>155</sup> During the deliberations for  
2 the Department of Defense Authorization Act for Fiscal Year 2005, the Senate proposed  
3 an amendment that would elevate the grade of the Judge Advocates General of the Army,  
4 Navy and Air Force to serve as three star general or flag officers.<sup>156</sup> Section 915 of the  
5 Senate proposed legislation did not address the grade of the SJA to the Commandant.

6 TJAGs and the SJA are selected using the promotion board procedures generally  
7 prescribed under 10 U.S.C. §§ 611 and 612. The proposed legislation would have  
8 retained these procedures, even though other three star flag or general officers are  
9 selected under 10 U.S.C. § 601. Section 601 positions are designated as “positions of  
10 importance and responsibility.” A selection board process is not used. Officers being  
11 considered for such positions are selected by the Military Department leadership and  
12 recommended to the Secretary of Defense for nomination by the President to the Senate  
13 for advice and consent.

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<sup>155</sup> 10 U.S.C. § 5046(a).

<sup>156</sup> S.2401 §§ 915(a)(2)(A) (Army), 915(a)(2)(B) (Navy), and 915(a)(2)(c) (Air Force).

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On September 20, 2004, the Secretary of Defense conveyed his opposition to Section 915. The Secretary of Defense proposed studying the relationship between legal elements of each Service and reporting the findings to Congress.<sup>157</sup>

On May 19, 2005, the Senate reintroduced the proposed legislation as Section 505 of the Fiscal Year 2006 Department of Defense Authorization Act.<sup>158</sup> The Senate Armed Services Committee (SASC) explained that this provision was because “[t]he greatly increased operations tempo of the Armed Forces has resulted in an increase in the need for legal advice from uniformed judge advocates in such areas as operational law, international law, the law governing occupied territory, the Geneva Conventions, and related matters.”<sup>159</sup> The SJA to the Commandant was not mentioned in either the proposed legislation or the Senate Report. On July 21, 2005, the Office of Management and Budget (OMB) submitted its Statement of Administration Policy regarding S. 1042, opposing Section 505.

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<sup>157</sup> In the final legislation, Congress included a provision creating an independent panel to study the relationships of the legal elements of each Service. Ronald W. Reagan Department of Defense Authorization Act for Fiscal Year 2005, P.L. 108-375, 118 Stat. 1923, October 28, 2004, § 574.

<sup>158</sup> S. 1042, National Defense Authorization Act for Fiscal Year 2006.

<sup>159</sup> Senate Report 109-69, National Defense Authorization Act for Fiscal Year 2006, S. 1042, p. 310. The House of Representatives version of the Fiscal Year 2006 Authorization Act does not contain any provision similar to the Senate provision relating to the grades of the TJAGs.

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1           The Panel received testimony and views on the proposed elevation in grade of the  
2 TJAGs during its hearings and in written correspondence. Two different views emerged.  
3 The first view supported the proposed elevation in grade primarily on the grounds that it  
4 would provide the TJAGs with better access and visibility to senior decision makers in  
5 the Department of Defense and their respective Military Departments. The majority of  
6 the witnesses testified that it is important to put the TJAGs and SJA on an equal footing  
7 with the Deputy Chiefs of Staff, who are three star officers and have a “seat at the table”  
8 during deliberations on critical issues. Elevation in grade would increase the opportunity  
9 for the TJAGs and SJA to be present during leadership meetings to identify and, if  
10 necessary, review legal issues that might not otherwise have been identified. These  
11 witnesses (including current and former TJAGs, SJAs, General Counsels, and clients)  
12 further believed that the TJAGs need to be three star officers to improve and enhance the  
13 delivery of legal services.<sup>160</sup>

14           The opposing view is that elevation could add pressure to increase grades  
15 authorized for other positions and, in any event, is not necessary to assure access. This

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<sup>160</sup> Hearing Transcript, Lt Gen Steven Polk, Inspector General, Department of the Air Force, June 1, 2005, p. 151; Hearing Transcript, May 19, 2005, Testimony of Major General Romig, pp. 235-241; *See also* Hearing Transcript, June 15, 2005, Testimony of Rear Admiral Donald Guter (Ret.), p. 256-57; Testimony of Mr. Gene Fidell, June 28, 2005, p. 168; Testimony of Dean Richard Rosen, June 28, 2005, p. 181; Testimony of Mr. Avon Williams, May 19, 2005, pp. 240-241.

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view was further based upon concerns that elevating the grade would require redistribution of three star flag or general billets. Most witnesses testified that, in the event Congress elevates the grades of the TJAG to three star flag or general officer, it should not apply the limitations on number and distribution of three star authorizations.<sup>161</sup>

The Panel notes that under the legislation as currently proposed, TJAGs would continue to be selected under Section 611, instead of Section 601, as other three star officers are selected. The Panel supports appointment under Section 601. Finally, the Panel notes that the Marine Corps was excluded from Section 505 of the S. 1042. The rationale to support elevation in grade of the TJAGs is equally applicable to the SJA to the Commandant.

## Findings and Conclusions

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<sup>161</sup> Hearing Transcript, Testimony of General Richard A. Cody, June 2, 2005, p. 251. The Panel notes that the proposed legislation would exclude the TJAGs from these limitations. Section 505(d).

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## APPENDIX \_\_\_\_\_

**Professional Development and Supervision of Attorneys**

**Across the Department Of Defense**

***Department of the Army (DA)***

**Professional supervision by the Army Office of General Counsel (OGC)**

The Army OGC has the authority to evaluate the qualifications of persons recommended for appointment, transfer, assignment, or promotion as civilian attorneys within the Department. Although the General Counsel (GC) has retained qualifying authority for all attorney positions in the Office of the Secretary of the Army, including its Field Operating Activities and for SES attorney positions Army-wide, the GC has re-delegated his qualifying authority for GS-15 attorneys and below and law clerk trainees to the senior attorneys of Army Material Command (AMC) and the U. S. Army Corps of Engineers (USACE) for all elements of their respective commands and to the Army JAG for all other elements of the Department. The JAG, the Command Counsel of AMC, and the Chief Counsel of USACE approve the professional qualifications of all civilian attorneys in the grade of GS-15 and below within their organizations. OGC is notified of these decisions.

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OGC's participation in the annual performance evaluations of the civilian heads of legal offices subordinate to them also affords oversight of the delivery of legal services throughout the Army. The GC and other heads of legal offices have been placed in the performance evaluation rating chains of those civilian heads of legal offices directly subordinate to them. For example, the Army GC is considered the next higher legal officer of both the Command Counsel, AMC, and the Chief Counsel, USACE; the GC serves as the intermediate rater for both attorneys. In turn, the Command Counsel, AMC, and Chief Counsel, USACE, are in the rating chains for their subordinate heads of legal offices. This rating scheme is continued down to the lowest activity and installation level of legal offices.

#### **Professional Supervision by the Judge Advocate General**

TJAG is responsible for recruiting, training, assigning, and directing military officers of the JAG Corps. Additionally, TJAG is the qualifying authority for certain DA civilian attorneys. Although the civilian and military attorneys directly under the qualifying authority of TJAG are located in commands and agencies world-wide, personnel management of both military and civilian attorneys is administered by one consolidated personnel office.

The Army TJAG established the Civilian Attorney Management Program to address all aspects of civilian attorney hiring and career progression for DA civilian attorneys under his qualifying authority. All recruitment actions for civilian attorney vacancies are initiated by local command Civilian Personnel Advisory Centers and

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vacancies are filled using procedures published in Army regulations. Selecting officials are required to forward the tentative selection to the Chief, Personnel, Plans and Training Office at the Office of The Judge Advocate General. TJAG is the qualifying authority for all selections.

TJAG also exercises oversight responsibility and provides technical assistance and professional guidance to all Judge Advocates and civilian attorneys under his qualifying authority. Oversight and technical assistance are normally exercised through technical channels that follow command lines. Military and civilian attorneys are accountable for their legal performance through these same technical channels. Accountability is maintained through the establishment of a professional Standards of Conduct system and compliance is required of all military and civilian attorneys.

#### **Army Material Command and U. S. Army Corps of Engineers**

The AMC Command Counsel, as qualifying authority and manager of AMC's formal civilian attorney career program is the approving official for all personnel actions taken in favor of or against AMC attorneys. The AMC Standing Committee on Professional Responsibility is a management tool that allows the organization to inquire into allegations of professional misconduct made against AMC attorneys. Allegations that are substantiated may be referred to state bar associations or supervisors for the consideration of disciplinary action.

The Chief Counsel, USACE, is the qualifying authority for all USACE civilian attorneys. As such, the Chief Counsel has the authority, without power of redelegation,

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1 to approve the qualifications of all persons recommended for appointment, transfer,  
2 reassignment, or promotion to positions as civilian attorneys and law clerks. This  
3 authority covers all USACE attorney positions in grades GS-15 and below, regardless of  
4 location. Division/Regional and District Counsels are selected and appointed by the  
5 Chief Counsel after consultation with the appropriate Commander(s) or Director(s).

6 The USACE Chief Counsel exercises tiered supervision and oversight of all legal  
7 offices throughout the USACE. Each USACE legal office is held accountable to the  
8 Command Counsel for the quality and timeliness of work products and for the  
9 professionalism of attorneys. All USACE attorneys are both rated and senior rated by  
10 attorneys. Commanders and directors for whom the heads of USACE legal offices serve  
11 as senior legal advisors have the non-delegable option to serve as their attorney's  
12 intermediate rater or to provide letter input to the attorney's performance evaluation. The  
13 Deputy Chief Counsel serves as the first-line supervisor of all Division/Regional  
14 Counsels and Center Counsels. Division/Regional Counsels are the first-line supervisors  
15 of Division/Regional staff attorneys and the District Counsels within their  
16 Division/Region. District Counsels perform the first-line supervisory function for  
17 District-level staff attorneys under the overall management of their respective  
18 Division/Regional Counsels.

19 Any allegation of professional misconduct by a USACE attorney is reported  
20 immediately to the Deputy Chief Counsel through the appropriate Division Counsel, as  
21 applicable. The Deputy Chief Counsel is charged with investigating the allegation and  
22 making appropriate disposition recommendations to the Chief Counsel.

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**Department of the Navy (DON)****Professional supervision by the Navy Office of General Counsel**

Navy OGC includes the vast majority of civilian attorneys practicing within the Department, including civilian attorneys working in the office of the Counsel to the Commandant of the Marine Corps. Navy OGC exercises qualifying authority responsibility over all civilian attorneys within the Department, except where delegated. The Deputy General Counsel acts as Community Manager for all civilian attorneys within the Department,. The GC evaluates or supervises the evaluation of all attorneys, uniformed and civilian, within OGC. The GC does not supervise non-OGC civilian attorneys supporting Navy TJAG or the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC). Navy TJAG or SJA to CMC, as the case may be, supervise the attorneys practicing under their cognizance.

**Professional Supervision by The Judge Advocate General (TJAG)**

The Navy TJAG has primary responsibility for ensuring ethical and professional practice of law by Judge Advocates and other covered attorneys. This supervision extends to both active duty and reserve judge advocates in both the Navy and Marine Corps as well as civilian attorneys and uniformed attorneys from other Services when they practice under cognizance of TJAG.

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**Professional Supervision by the SJA to CMC**

The SJA to CMC has direct supervisory authority over all active and reserve judge advocates and civilian attorneys assigned to the Marine Corps Judge Advocate Division. The SJA to CMC serves as the occupational sponsor for all active duty Marine Corps judge advocates and advises the Deputy Commandant, Manpower and Reserve Affairs, regarding which Marine Corps judge advocates are best suited to fill particular billets. The SJA to CMC serves as Rules Counsel for matters of professional ethics involving Marine Corps judge advocates or civilian attorneys under his cognizance and reports to the Navy TJAG with regard to oversight of professional responsibility matters in the Marine Corps.

***Department of the Air Force (DAF)*****Professional Supervision of Civilian Attorneys by GC and TJAG**

The General Counsel and Judge Advocate General are each responsible for the professional supervision of attorneys employed by or deemed members of their respective organizations. However, the initial determination that a civilian attorney candidate is professionally qualified is made for both the General Counsel and the Judge Advocate General Corps by the Air Force Civilian Attorney Qualifying Committee (AFCAQC).

The AFCAQC was established jointly by the General Counsel and the Judge Advocate General to define and manage policies appropriate for the effective

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1 administration of Air Force civilian attorneys. While the initial steps of the selection  
2 process for civilian attorneys are decentralized and conducted by the local command or  
3 organization proposing to hire a civilian attorney, the AFCAQC, in its role of “Qualifying  
4 Authority” must determine that a candidate meets the requirements for a given position  
5 before the appointment is approved. By regulation, qualifying authority for all GS-14  
6 and 15 hiring and promotions actions within the Air Force, all hiring actions proposing to  
7 use accelerated procedures and all promotions of attorneys with less than one year in  
8 grade have been reserved to the AFCAQC. Approval authority for hiring GS-13 and  
9 below civilian attorneys has been delegated to Major Command or Field Operating  
10 Activity Staff Judge Advocates, Directors or equivalents. Local selection committees  
11 must include at least one attorney representative.

12       The AFCAQC has traditionally been composed of two representatives of the  
13 General Counsel and one from the Judge Advocate General Corps, all of whom are  
14 required to be civilian attorneys. All members of the AFCAQC are appointed by the  
15 Secretary of the Air Force. At the request of the General Counsel, Judge Advocate  
16 General, or on its own initiative, the AFCAQC provides advice and makes  
17 recommendations concerning any aspect of the civilian attorney workforce.

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**Professional Supervision of Judge Advocates by TJAG**

The Air Force TJAG exercises professional supervision of the JAG Corps<sup>162</sup> by ensuring members of the Corps are properly trained, perform their duties in a proficient manner, and comply with the ethical standards they are required to meet. TJAG's professional responsibility program sets out the policies and standards the attorneys are required to meet and an Ethics Advisory Counsel serves as an independent resource for attorneys who have ethics questions. The program also sets out procedures to investigate and evaluate allegations of rules violations and impose sanctions if necessary. In the event there has been an allegation of a violation of a rule, the complaint will be referred to the Major Command Staff Judge Advocate (SJA), who may refer the allegation to TJAG. TJAG may withdraw the member's judge advocate designation and/or notify the member's state licensing authority of the findings under the professional responsibility program.

In the Air Force, unlike the Army, the term JAG Corps includes both military judge advocates and Air Force civilian attorneys supporting TJAG functions. There are approximately 260 JAG Corps civilian lawyers who work for commanders in the field. Like their active duty counterparts, these civilian attorneys report through the chain of command to local and major command commanders. They are under the professional

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<sup>162</sup> In the Air Force, the term "JAG Corps" includes military judge advocates, civilian attorneys, paralegals, and administrative staff supporting TJAG functions.

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1 supervision of, but do not report to, TJAG. There are approximately 40 JAG Corps  
2 civilian attorneys in the Washington, D.C. area who directly or indirectly support  
3 headquarters JAG functions.

#### 4 ***Department of Defense Attorneys at Joint Commands***

5 Civilian attorney positions at a joint command belong to the military department  
6 that is designated as the executive agent for that command. Pursuant to DOD Directive  
7 5100.3, the supporting military departments “program and budget to fund, without  
8 reimbursement, the administrative and logistic support required by the supported joint  
9 headquarters to perform their assigned missions effectively.” For example, the Army is  
10 the executive agent for U.S. European Command (EUCOM). Civilian attorneys assigned  
11 to this command are Army employees. The Army JAG is the qualifying authority for  
12 these civilian attorneys. The Army JAG is also responsible for ensuring general  
13 compliance with the rules of professional conduct for lawyers by personnel under their  
14 qualifying authority. Therefore, an ethics complaint against a civilian attorney in a joint  
15 command for which the Army is executive agent would be sent to the Office of the Army  
16 JAG, Standards of Conduct Office. In this example, although the Army employs, funds  
17 and acts as qualifying authority for civilian attorneys at EUCOM, these civilian attorneys  
18 work for and report to the Staff Judge Advocate of EUCOM on a daily basis.

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## Professional Development

### ***Department of the Army***

The Army has three training plans for its civilian attorneys. The JAG, AMC, and USACE each have programs tailored to meet the needs of their clients and to professionally develop their civilian attorneys.

### **Army GC and TJAG**

GC and TJAG developed the Civilian Attorney Management Master Training Plan in 1996. This plan mirrors the Army's program for the development of Judge Advocates throughout their careers. The plan includes attendance at schools and completion of courses to further an attorney's training and experience. The primary course, the Judge Advocate Officer's Basic Correspondence Course, provides a basic orientation of the legal areas in which an Army attorney operates. Topics covered include personnel law, legal basis of command, claims, legal assistance, criminal law, federal contract and fiscal law and the law of war and status of forces agreements. The Judge Advocate Officer Graduate Course, accredited by the American Bar Association, prepares experienced attorneys for supervisory duties and other positions of increased responsibility. Students who pass the course receive a Master of Laws in Military Law. This program is for GS-12 to -14 and GM-13 to -14 attorneys.

Civilian attorneys frequently attend continuing legal education (CLE) courses at the Army Legal Center and School in Charlottesville, Virginia. The courses range from a

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1 basic overview of a legal area to detailed updates in particular areas of the law. Civilian  
2 attorneys in the Army can also attend the Legal Education Institute through the  
3 Department of Justice. The institute has a wide variety of subjects, including negotiation  
4 techniques, ethics, legal writing, and computer assisted legal research. All lawyers are  
5 eligible to attend the institute. Civilian attorneys can attend a Management Staff College  
6 in Ft. Belvoir. This is a 14-week course designed to instruct Army leaders in functional  
7 relationships, philosophies, and systems relevant to the Total Army with emphasis on the  
8 sustainment base. This course is intended for GS-12 through 14-level Army civilian  
9 employees. Civilian attorneys can also attend senior Service colleges. The Army War  
10 College focuses on the role of land power; the National War College focuses on national  
11 security strategy; and the Industrial College of the Armed Forces focuses on the resource  
12 component of national power.

### 13 **Army Material Command (AMC)**

14 AMC professional development of its civilian attorneys focuses on each  
15 attorney's IDP and includes all types of formal and informal training to include  
16 supervisory, management, and business training, on and off-duty courses and  
17 developmental activities. AMC established a standing committee on training that serves  
18 as a clearinghouse of information on training opportunities and related matters. An  
19 important component of AMC training is its CLE program which focuses on licensing  
20 requirements, as well as professional growth in specific legal subjects and issues. For  
21 familiarization and training purposes, attorneys and patent advisors may be rotated within  
22 their current office or between other AMC legal offices. Attorneys may also be

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temporarily detailed to non-legal positions to widen their breadth of experience. A goal of forty hours of professional training per individual per year has been established for each AMC counsel.

#### **The U.S. Army Corps of Engineers (USACE)**

The USACE established a comprehensive attorney career development program for all Corps attorneys to implement the Chief Counsel's national law firm initiative. The Chief Counsel's Total Attorney Career Development Program (TACDP) is a formal integrated career development and management program and is open to all Corps attorneys. There are two levels in the TACDP. The first level is Basic Legal and Leadership Development. This includes training in core legal areas and should be completed by all entry-level attorneys, including law clerks who transition to attorney positions. Level 2 is the Advanced Training and Development Program and is open to GS-12 to 14-level attorneys to prepare them for supervisory positions. The attorney who completes Level 2 is ready for a managing attorney position in the Corps.

#### ***Department of the Navy (DON)***

##### **Office of the General Counsel (OGC)**

Career development within Navy OGC begins with new attorney orientation. Every January OGC conducts this program for all attorneys at all levels who have joined OGC within the past calendar year. The program introduces new attorneys to OGC's organization, history, and mission. New attorneys meet OGC's senior leadership, learn

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1 the expectations of those leaders, and how OGC supports DON's overall mission.  
2 Attendees also learn what resources and opportunities are available to them. OGC also  
3 provides formal leadership and supervisory skills programs every March. This training is  
4 required for all OGC supervisors.

5 The Harvey J. Wilcox Fellowship provides mid-level OGC attorneys with an  
6 opportunity to spend one year in the Central Office. The fellow rotates through each  
7 Associate and Assistant GC's office, in addition to a rotation with the Counsel for the  
8 Commandant of the Marine Corps. The OGC Shadow Program selects four OGC  
9 attorneys each year to "shadow" the GC for a week. This program provides the attorneys  
10 with a better understanding of the OGC organization and the functions and  
11 responsibilities of these positions. OGC also offers a formal internship program to its  
12 attorneys. The OGC Internship Program provides OGC attorneys with opportunities to  
13 broaden their knowledge base within OGC practice areas and to more effectively satisfy  
14 DON's needs through short and long-term rotations. Civilian OGC attorneys also have  
15 the opportunity to take rotational assignments at other DoD facilities or federal agencies.  
16 In the past these assignments have included the Office of the Secretary of Defense  
17 International Law Office, the Department of Justice, and the White House.

18 OGC also sponsors a pilot Major System Acquisition training course for attorneys  
19 through the Defense Acquisition University. The sole focus of this course is on the legal  
20 aspects of acquiring DOD major systems. OGC sponsors two seminars each year. The  
21 spring conference focuses on major DON and OGC policy changes. The fall conference  
22 focuses on issues that interest OGC attorneys practicing at our field offices. OGC also

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1 offers numerous training courses in its substantive practice areas. Several offices provide  
2 formal training programs. The Counsel's office for Financial Management holds fiscal  
3 law training; the Counsel's office for Manpower and Reserve Affairs holds training for  
4 civilian personnel law; and the Litigation office provides training on discovery and other  
5 issues. Individual OGC offices also conduct training sessions for their attorneys. Topics  
6 include issues specific to that office, as well as updates on substantive areas of the law  
7 and broader process and policy issues facing OGC.

8 The Executive Steering Group (ESG) provides executive direction to OGC. The  
9 ESG is currently conducting a review of OGC's training curriculum and training  
10 programs. The ESG also is reviewing the core skills and competencies that all OGC  
11 attorneys need to successfully perform their duties as it establishes communities of  
12 practice.

### 13 **Judge Advocate General**

14 The Navy judge advocate community includes 36 civilian attorneys. These  
15 attorneys are hired for their expertise in the provision of general legal assistance so they  
16 are not initially trained in the same way as new judge advocates. Shortly after being  
17 hired they do attend the General Legal Assistance Course at the U.S. Army Legal Center  
18 and School. CLE becomes an important component of their training throughout their  
19 career. CLE could include classes at the Naval Justice School, or local legal training in  
20 the states where they are licensed. In addition to this formalized classroom training,  
21 civilian attorneys routinely receive electronically-distributed Legal Assistance Program

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Advisories and Immigration Advisories. These documents are practice notes and updates on relevant areas of legal assistance law and immigration law, including consumer protection, estate planning, tax law, family law, and citizenship matters. Regular training also takes place within individual legal assistance offices. This training focuses on important areas of local practice. There is no Navy-wide professional development plan for civilian legal assistance attorneys practicing under the cognizance of Navy JAG. Instead, each NLSO commanding officer has discretion to tailor civilian training plans specifically for the needs of each attorney. All civilian attorneys are required to complete the newly created Professional Responsibility Training Module, an interactive on-line course that covers the Navy's Rules of Professional conduct.

## **United States Marine Corps**

The Marine Corps judge advocate legal community has 5 civilian attorneys hired for their expertise in specific areas of the law. These five attorneys work in the fields of legal assistance, operational law, and administrative and civil law. The Marine Corps does not have a formal training program for these 5 attorneys. However, they are required to complete the Professional Responsibility Training Module and they regularly attend CLE that complements their areas of practice.

## ***Department of the Air Force***

SAFO 111.5, *Functions and Duties of the General Counsel and the Judge Advocate General*, July 14, 2005, provides that the General Counsel is responsible for oversight of the professional and career development of civilian attorneys, including the

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1 development of a civilian attorney career program. The Air Force is currently working to  
2 establish a comprehensive career program for all civilian attorneys. The program will  
3 focus on appropriate professional and leadership training, temporary career broadening  
4 assignments, and the identification and referral of qualified applicants for attorney  
5 vacancies.

6 The General Counsel advises that the program for civilian attorneys will also be  
7 consistent with the objectives of the global civilian employee development program  
8 being designed by the Air Force Director of Personnel. This program, titled "Civilian  
9 Force Development" (CFD) will bring the career developmental process for civilian  
10 employees more in line with existing programs for military members. The objective is to  
11 manage the professional development of Air Force military members and civilian  
12 employees holistically, as a Total Force. While the Air Force Civilian Attorney  
13 Development Program will include accession, development, advancement, and  
14 sustainment of civilian attorneys, it will not alter reporting relationships or the functional  
15 supervision of civilian attorneys. On July 28, 2005, the Acting Secretary of the Air Force  
16 approved the program elements for an Air Force civilian attorney development program  
17 covering attorneys assigned to both the GC and JAG organizations.<sup>163</sup>

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<sup>163</sup> Memorandum, Dep't of Air Force, 28 July 2005, subject: Air Force Civilian Career Program.

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**1 Office of General Counsel (OGC)**

2           Currently, within OGC, there are five-year training and development plans for  
3 each division. These plans are tailored so that individual attorneys in a division receive  
4 training that complements their areas of practice and their experience level. OGC has  
5 identified basic courses to which all attorneys should be exposed. They include contract  
6 law, fiscal law, and the Freedom of Information and Privacy Acts. More specialized  
7 legal training, such as advanced environmental or labor law, is included in the plans for  
8 more senior attorneys. In addition to professional legal education, OGC attorneys can  
9 take advantage of opportunities for sponsored leadership and professional military  
10 education. Those opportunities include the Industrial College of the Armed Forces, Air  
11 Force Air Command and Staff College, the Kennedy School of Government, and the  
12 Federal Executive Institute. The new civilian attorney career development program will  
13 include similar opportunities for career broadening and advanced education, and  
14 internships at headquarters.

**15 Judge Advocate General**

16           Air Force JAG Corps civilian attorneys regularly attend continuing legal  
17 education CLE courses taught at the JAG Schools from all three military departments.  
18 The bulk of the civilian attorneys who attend these courses study in subjects such as  
19 contract law and litigation, fiscal law, ethics, labor law, and environmental law.  
20 Approximately 200 civilian attorneys travel every year to CLE courses. In addition to in-  
21 residence CLE, two to three courses a year are broadcast to bases via satellite.

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1 Additionally, JAG Corps civilian attorneys are eligible to participate in the same  
2 sponsored leadership and professional military education opportunities mentioned with  
3 regard to OGC attorneys above.

#### 4 ***Department of Defense Office of General Counsel***

5 Civilian attorneys in the Department of Defense Office of General Counsel (DoD  
6 GC) attend legal and leadership training hosted by federal and state bar associations, the  
7 Department of Justice, Office of Personnel Management, and specialty bar groups. DoD  
8 GC civilian attorneys participate in the JAG schools of all the military departments, both  
9 as attendees and as lecturers, guest speakers and panel members. Additionally, DoD GC  
10 provides internships and developmental training for civilian attorneys in international  
11 affairs, intelligence, environmental law, personnel and health policy and standards of  
12 conduct.

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